THE MECHANICAL ROYALTY RATE ON SOUND RECORDINGS: SURVEY OF ISSUES BEFORE THE JUDICIARY COMMITTEES OF THE CONGRESS

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INTRODUCTION

With the enactment of the U.S. Copyright Act of 1909, the Congress for the first time in the history of U.S. copyright law made provision for certain protections relating to the mechanical reproduction of copyrighted musical works. In doing so, it established a system of compulsory licensing designed (1) to protect the mechanical reproduction rights of the copyright owner--hereafter frequently referred to as the music publisher, and (2) to provide adequate compensation to the copyright owner for the extension of such rights to parties other than himself. In the latter instance, the fee to be paid the copyright holder would be "2 cents on each such part manufactured." Over the years this statutory licensing fee has been most commonly referred to as the mechanical royalty rate.

Since 1964 the Congress has been considering a proposal which would authorize an increase in the present mechanical royalty rate ceiling which is the same ceiling provided for in the 1909 law. This proposal, one of several recommended revisions of the copyright law currently under consideration by the Congress (S. 543, 91st Congress), has been the subject of vigorous debate between the two parties principally affected by a rate increase--namely, the music publishers and the record producers. The music publishers, since the initial introduction of this proposal in the first draft of the new copyright revision law introduced in the second session of the 88th Congress (identical bills introduced in both

the House and the Senate on July 20, 1964), have consistently supported an increase in the royalty rate, taking the position that such an increase is not only justified but long overdue. Spokesmen for the record industry, on the other hand, have voiced vigorous opposition to any increase in the rate, contending that such an increase in the statutory rate to be paid by the industry to copyright owners is unjustified and would have a seriously adverse impact on the entire record industry.

This study will attempt to review and place into perspective the principal arguments voiced by both the music publishers and the record producers in their respective testimony before Subcommittee No. 3 of the House Judiciary Committee and the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary during the 89th and 90th Congresses. Its primary objective is to determine whether or not the Congress to date has been furnished by the parties involved the type of information which will be needed to render an informed and equitable judgment on the mechanical royalty rate issue. While an effort is made to evaluate the data submitted by the interested parties and supply such supplementary information as could be obtained, this report does not make any recommendations for or against any specific change in rates.

Some background information is necessary, however, before embarking upon this review and evaluation. Such a background will help the reader understand why the Congress to date has found it so difficult to reach a legislative solution to the issue dividing the publishers and the record producers. The topical areas covered in Parts I and II will serve this purpose. Part I will review (1) the original intent and scope of the 1909

copyright law relating to mechanical reproduction rights involving musical works; (2) the application of compulsory licensing (with particular emphasis on the application of the mechanical royalty rate); and (3) important structural changes in the music-recording business since 1909.

Part II will review the various proposed changes in the law relating to compulsory licensing and the mechanical royalty rate which have been offered for consideration since 1961, beginning with the first proposal of the Copyright Office recommending the complete elimination of the compulsory licensing requirement and extending to the recent proposed revision in S. 543, 91st Congress, calling for the retention of the compulsory licensing system and an increase in the mechanical royalty rate.

Part III will involve a review and evaluation of Congressional testimony concerning the mechanical royalty rate issue, beginning with the hearings held by Subcommittee No. 3 of the House Committee on the Judiciary in May, June, August and September of 1965[1/] and extending through the hearings held by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary in August 1965,[2/]

1/ U.S. Congress. House. Committee on the Judiciary. Copyright law revision. Hearings before Subcommittee No. 3 of the Committee on the Judiciary on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835. May 26, 27, 28; June 2, 3, 4, 9, 10, 16, 17, 23, 24, 30; August 4, 5, 11, 12, 18, 19, 26; September 1 and 2, 1965. Parts 1-3. 89th Congress, 1st sess. Washington, U.S. Govt. Print. Off., 1965. 2056 p. (Referred to hereafter as House hearings.)

2/ U.S. Congress. Senate. Committee on the Judiciary. Copyright law revision. Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary. Pursuant to S. Res. 48 on S. 1006. August 18, 19, and 20, 1965. 89th Cong., 1st sess. Washington, U.S. Govt. Print. Off., 1967. 242 p.

and in March-April 1967.[1/] This part also takes into account other pertinent information furnished to the Congress subsequent to these hearings. In the final section of Part III some general concluding observations based on the findings contained in this report are submitted.

1/ U.S. Congress. Senate. Committee on the Judiciary. Copyright law revision. Hearings before the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary. Pursuant to S. Res. 37 on S. 597. March 14, 16, 17, 20 and 21; April 4, 6, 11, 12 and 28, 1967. Parts 1-4. 90th Cong., 1st sess. Washington, U.S. Govt. Print. Off., 1967. 1383 p. (Referred to hereafter as Senate Hearings (1967).)

PART I. BACKGROUND

Prior to the enactment of the U.S. Copyright Act of 1909, existing copyright law provided no protection concerning the reproduction of copyrighted musical works by mechanical means. As late as 1908, the Supreme Court in White-Smith Music Publishing Company v. Apollo Company[1/] upheld this interpretation of the law by ruling that the production and sale of a player piano roll (and by implication, reproduction by means of sound recordings) of a copyrighted musical composition did not involve copying and, thereby, did not constitute an infringement of the reproduction rights of the copyright owner. However, with the enactment of the revised copyright law in 1909, Congress brought relief to copyright owners by affording certain specific protections relating to the reproduction of musical compositions by mechanical means--"such as disks, rolls, bands or cylinders for use in music-producing machines."[2/]

Original Intent and Scope of Sections 1(e) and 101(e) of the U.S. Copyright Act of 1909

In essence, sections 1(e) and 101(e) of the new law provided that once the owner of a musical copyright has "used or permitted or knowingly acquiesced [underlining added] in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work," any other person may record the work provided that he (1) notifies the

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1/ 209 U.S. 1; 28 Sup. Ct. 319, 52 L. Ed. 655 (1908).

2/ Act of March 4, 1909 (35 Stat. 1075), effective July 1, 1909, 17 U.S.C., sections 1(e) and 101(e).

copyright owner of his intention to do so and (2) pays to said owner a royalty rate--hereafter referred to as the mechanical royalty rate--of 2 cents on "each such part manufactured." This new procedure, which became effective on July 1, 1909, brought into being for the first time in the history of U.S. copyright law a new means of copyright protection in the music field commonly referred to as compulsory licensing.

In general this law was designed to fulfill three objectives: (1) the prevention of the unauthorized reproduction of copyrighted musical compositions by sound recording or other mechanical means; (2) adequate compensation for composers and owners of published and unpublished copyrighted musical works used in sound recordings; and (3) the prevention of a potential monopoly in the music business.

In the initial stages of its deliberations on suggested reforms in the copyright law, the Congress was urged to grant exclusive mechanical reproduction rights to the owner of a copyrighted musical work. However, when it became apparent that such action on the part of the Congress could enable one company to gain a complete monopoly of the music-roll business, the Congress soon agreed that it would not authorize complete and exclusive mechanical reproduction rights to the copyright owner.

Though phonograph records were being marketed at the time, the principal means of mechanical reproduction in the music field were player piano rolls. Given the distinct possibility that the Congress would reverse the 1908 opinion of the Supreme Court in White-Smith Music Publishing Company v. Apollo Company and grant for the first time exclusive mechanical reproduction rights to the copyright owner, the Aeolian

Company--by far the largest manufacturer of player piano rolls--prior to the enactment of the 1909 copyright reform law, succeeded in purchasing the exclusive piano roll rights to copyrighted music of more than eighty of the leading music publishing houses in the country. As described by one source close to the music industry:[1/]

> . . . [Aeolian] had made exclusive contracts with the major publishers whereby there would be a preemption of the mechanical reproduction rights to the catalogues of the publishers upon recognition of mechanical rights by court decision or by statute. Under the contracts, exclusive mechanical rights would be acquired for a period of at least thirty-five years, with the possibility of almost indefinite extension.

Given this monopoly or near monopoly situation, the Congress soon realized that it must be concerned not only with protecting the composer and copyright owner as to mechanical reproduction rights, but also with the prevention of a music monopoly which could very well evolve from granting the copyright owner exclusive mechanical reproduction rights. Accordingly, the Committees on Patents of both the House and the Senate in final reports to the Congress[2/] expressed the view--in identical

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1/ Shemel, Sidney and M. William Krasilovsky. This business of music. New York, Billboard Publishing Co., 1964. p. 123.

2/ U.S. Congress. House. Committee on Patents. To amend and consolidate the acts respecting copyright; report to accompany H.R. 28192. [Washington, U.S. Govt. Print. Off., 1909] p. 9. (60th Cong., 2d sess. House. Report no. 2222); and, U.S. Congress. Senate. Committee on Patents. To amend and consolidate acts respecting copyright; report to accompany S. 9440. [Washington, U.S. Govt. Print. Off., 1909] p. 9. (60th Cong., 2d sess. Senate. Report no. 1108)

language---that the proposed law relating to mechanical rights should be formulated in a manner

> . . . which would give to the composer the exclusive right to prohibit the reproduction of his music by mechanical means on the part of anybody if he desired, to secure to him adequate compensation from all reproducers if he did not desire to exercise this exclusive right to prohibit and to prevent the establishment of a great trade monopoly. We fully believe that all this will be secured under the provisions of subsection (e).
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> It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices.

Hence, in the view of the Congress at that time, these objectives could be best carried out by a system of compulsory licensing as provided for in sections 1(e) and 101(e) of the new copyright law.[1/]

Compulsory Licensing: Its Application Since 1909

With the exception of a few minor technical changes in the law, the wording, scope and intent of sections 1(e) and 101(e) have remained unchanged since their adoption in 1909. Over the years numerous attempts have been made on the one hand to eliminate and on the other to extend these statutory requirements relating to recording and mechanical

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1/ For more detailed legislative history see: Henn, Harry G. The compulsory license provisions of the U.S. copyright law, study no. 5 in series (dated July 1956). Copyright law revision, studies prepared for the Copyright Office and subsequently published by the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Sixth Congress, First Session, pursuant to S. Res. 53. Washington, U.S. Govt. Print. Off., 1960. pp. 1-12. (Committee print, 86th Cong., 1st sess.); and, House hearings, part 2. pp. 674-678.

reproduction rights. However, such attempts have failed thus far to gain Congressional approval. Prior to attempts in the 89th and following Congresses to effect certain revisions in sections 1(e) and 101(e), the most active period of legislative activity occurred from the mid-1920's through the late 1930's. Harry G. Henn, in a study prepared for the Copyright Office in 1956, studied this period in considerable detail and concluded that:[1/]

> A review of the testimony contained in the hearings and the reports reveals the fact that between the mid-1920's and the late 1930's a number of attempts were made to eliminate or extend the compulsory license provisions. Each attempt, however, provoked considerable controversy. The development of radio and other electronic devices for the recording and reproduction of sound provided the motivation behind many of the proposals, while economic conditions affecting the phonograph industry exerted a counterbalancing influence.
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> Conflicts arose between the creators and the users. The principle of compulsory license was attacked by the authors because it restricted their bargaining power; the benefits derived from the statutory royalties went to the music publishers as copyright owners, rather than to the authors; and the copyright owners frequently found their works being exploited by unscrupulous, financially irresponsible recording manufacturers. Consistently throughout the period, the manufacturers of piano rolls and phonograph records pleaded the economic necessity of having complete accessibility to all music and of restricting the payment of royalties to a relatively low percentage of the cost of production. When faced with the prospect of being required to pay fees for each performance of recorded music, the radio and jukebox industries threw their support to the recording manufacturers in opposing the introduction of a compulsory license for public performance rights of records and transcriptions.

In spite of the fact that the compulsory licensing provisions of the law have remained unchanged over the years, both the record producers and

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1/ Henn, Harry G. Op. cit., p. 35.

the owners of copyrighted musical works--the latter often referred to as music publishers--in practice have not always adhered to the literal language of the law. The law, for example, provides that a mechanical royalty of "2 cents on each such part manufactured" be paid by the record producer to the music publisher. However, with the revolutionary advances in the technology of sound recordings and the marked structural changes that have taken place in the industry itself over the years, the music-recording industry has relied upon a less literal interpretation of this proviso. Since technical advances have enabled one to produce a record containing one or more compositions on either side, recording agreements involving copyrighted compositions apply the mechanical royalty rate to each selection reproduced. Moreover, many licensing agreements provide that mechanical royalties will be paid on all records produced and sold rather than on all records manufactured as provided for in the law.[1/]

As far as the statutory rate or mechanical royalty rate itself is concerned, its application in licensing agreements has also varied. Ever since the introduction of low price records in the 1930's, copyright owners have often found it necessary to agree to mechanical royalty rates which are less than the statutory 2-cent maximum. Under the Music Publishers' Protective Association's (MPPA) long-form license, for example, the royalty scale is based on the manufacturer's suggested retail list prices of records, as follows: 1 1/4 cents per song for a record selling at 35 cents or less; 1 1/2 cents per song at 36 to 50 cents; 1 3/4 cents per song

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1/ Shemel, Sidney and M. William Krasilovsky. Op. cit., p. 124.

at 51 to 60 cents; and 2 cents per selection for all records selling at 60 cents or more.

Moreover, with the introduction of extended play (45 rpm) and long-playing (33 1/3 rpm) records after World War II, it was again necessary to determine new royalty rates. Under the MPPA long-form license, for example, the rate is 1 1/2 cents per selection, per side on extended play records (EP's) with a list price under $1.41 and the full statutory rate of 2 cents per selection, per side for EP's retailing for more than $1.41. For long-playing records (LP's) the MPPA long-form license also provides for different rates according to price range at the retail level (i.e., the manufacturer's suggested list prices): 1 1/2 cents per selection, per side on records priced below $2.85; 1 3/4 cents per selection for records priced $2.86-$3.00; and the statutory rates on records priced above $3.00. An alternative to this method of basing the royalty rate on the suggested retail price is one based on playing time under which the standard rate for EP's and LP's is set at 1/4 cent per minute of playing time or fraction thereof, with a minimum of 2 cents a side.[1/] In addition it should be noted that mechanical royalties are often paid to the music publisher quarterly instead of monthly as provided in the statute.[2/]

These rate schedules are cited only as examples of the various mechanical royalty arrangements which have been agreed to by the

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1/ Corry, Catherine S. The phonograph record industry; an economic study. The Library of Congress, Legislative Reference Service, February 9, 1965. p. 35; and Senate hearings (1967), part 2. p. 399.

2/ Shemel, Sidney and M. William Krasilovsky. Op. cit., p. 126.

publishers and the record producers over the years. In recent years the music publishers and record producers have differed over whether or not the statutory rate of 2 cents is a ceiling rate or generally the going rate charged for the bulk of the copyrighted music sold on phonograph records. The publishers have contended that a major proportion of all records produced under negotiated licensing agreements are subject to a rate of less than the 2-cent statutory rate. In their view, the 2-cent rate acts as a ceiling, not the going rate for most recordings. The record producers, on the other hand, have argued that with the exception of certain stereotyped (or standardized) rate variations[1/] from the 2-cent statutory rate, the bulk of all recordings produced are subject to the payment of the statutory maximum. This debate between the publishers and the record producers will be developed in more detail in Part III of this study.[2/]

Structural Changes in the Music Recording Business Since 1909

As we might expect, the relationship between the music publisher and the record producer today is, in many respects, markedly different from what it was at the time the compulsory licensing provision was first incorporated in the copyright law in 1909. Sixty years ago the music publisher was the principal link between the author and composer on the one side and the consumer on the other. Music publishing involved primarily

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1/ For a more detailed explanation of what the record industry terms "stereotyped rate variations," see pages 64-66 below.

2/ See pages 63-73 below.

the sale of sheet music and the promotion of live performances of musical works contained in the publishers' catalogues. The record business, on the other hand, was in its infancy and commanded a relatively minor share of the music business. Yet with the successful introduction of electrical sound recording, radio, talking pictures and television, sheet music and live performances are no longer the principal means of distribution in the music business. Today the principal means by which musical works are made easily accessible to the consumer is the sound recording.

Of the relatively few sound recordings produced and sold in 1909, virtually all were produced by three companies--Columbia, Victor and Edison. The music publishing business was likewise highly concentrated, with the bulk of the business being controlled by a half dozen firms who in turn derived about 90 percent of their total receipts from sales of sheet music.[1/] However, due largely to the profitable exploitation of a number of revolutionary technological advances that have occurred in the music-recording field over the years, and particularly since World War II, barriers to entry of new firms in both segments of the business have been virtually eliminated. As a result, neither segment today is concentrated in the hands of a few firms.[2/]

Moreover, it is becoming increasingly difficult to distinguish clearly between the business activities of the music publisher and the record producer in the music field. Until the early 1940's the record

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1/ Senate hearings (1967), part 2. pp. 390-391.

2/ Evidence supporting this conclusion is presented below on pages 24-29.

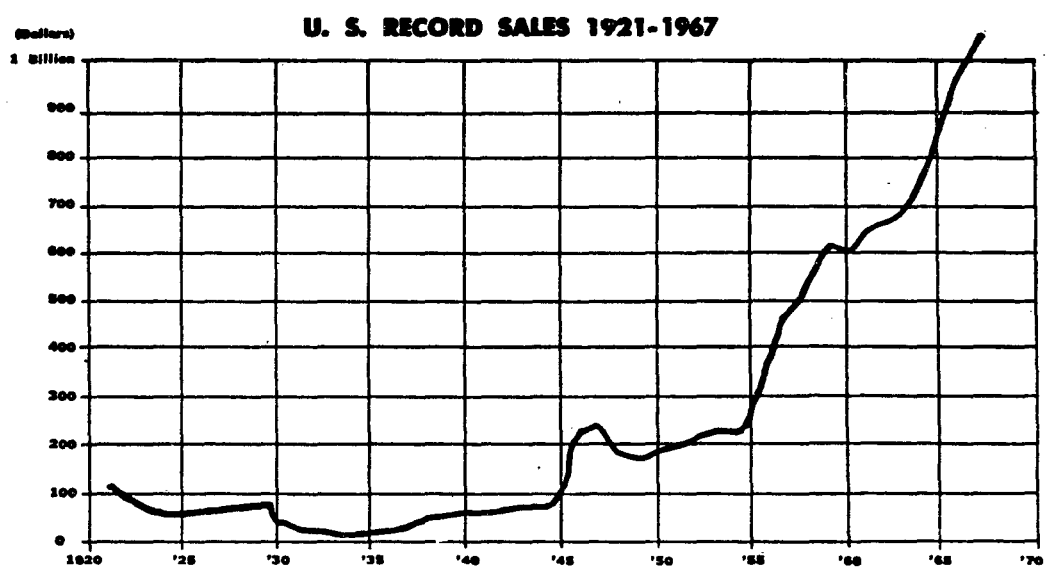
industry, with the exception of certain specialty fields, generally refrained from becoming directly involved in the publishing field. Yet with the many changes that have taken place in the marketing structure of the music-recording business since the end of World War II, many record producers, including virtually all of the major producers, have become actively and increasingly involved in the publishing field. Many publishers, as well, have extended their activities to the production and distribution of records. Moreover, in recent years many song writers and recording artists have set up their own companies which handle the publishing, recording, and distribution of their copyrighted musical compositions.

Hence, it is seen that both segments of the music-recording business have changed substantially over the years and have become increasingly interrelated in their functions, especially since the end of World War II. These developments, which could have an important bearing on the outcome of the mechanical royalty rate issues with which this study is concerned, and the important structural changes that have taken place in the record industry and in music publishing--especially since World War II--are discussed in greater detail below.

Record Industry

Upon reaching a peak of about $100 million in sales in 1921, the record industry for several years thereafter went into a state of deep decline, brought on largely by stiff competition from the radio in the 1920's and the economic depression of the 1930's. As seen in the chart

below, the industry reached its lowest ebb in 1933 when sales fell to a level of about $6 million. Thereafter recovery was gradual and unimpressive through the end of World War II, with sales in 1945 reaching for the first time the earlier peak level recorded in 1921. From 1945 to 1946 sales jumped sharply by about 100 percent, increased to a slightly higher level in 1947, and then dropped in 1948 and 1949. For several years thereafter the industry's sales pattern exhibited a gradual but unimpressive recovery through the middle 1950's. Thus, with the exception of a brief but sharp burst in sales at the end of World War II, the sales performance of the record industry from the early 1920's through the middle 1950's was lackluster.



SOURCE: Billboard, "1968-69 International buyer's guide of the music-record industry" (Cincinnati, Ohio) v. 80, no. 35, August 31, 1968: 12.

Since 1954, performance of the industry has been markedly different. As seen in the chart above, record sales--with the exception of brief pauses in 1960 and 1963--have registered a steep and virtually uninterrupted climb. According to estimates made by Billboard publications, total industry sales during this period have increased from $213 million in 1954 to slightly over $1 billion in 1967, representing an average annual rate of increase (compounded) of about 13 percent. Estimates by the Record Industry Association of America (RIAA) show a very similar pattern of rise--from $183 million in 1954 to $780 million in 1967, or an increase of about 12 percent annually. These data indicate a rate of growth which substantially exceeds that recorded for the national economy. In the same period, the Gross National Product (in current dollars) registered a gain of 6 percent annually.

This rapid expansion of the industry since the middle 1950's has been due in large part to a number of important market changes which have occurred over the past several years, including more widespread use of EP (45 rpm) and LP (33 1/3 rpm) recordings, the advent of the Rock and Roll influence, the introduction of record clubs, the introduction of stereophonic LP recordings, the widespread use of musical recordings by radio stations which had lost most of their traditional entertainment functions to television, and the big push by the record industry to cultivate the music tastes of the rapidly growing youth market.

Moreover, sales have been affected by numerous changes that have taken place in the distribution of records over the past several years.

Records are no longer sold exclusively by retail outlets specializing in record sales. The consumer today is given multiple sources from which he may purchase phonograph records: record stores, record racks in supermarkets, department stores and variety stores, record clubs, and mail order packages. Record sales by type of outlet for 1966 and 1967 are shown below.

Total Dollar Sales—by Type of Outlet
(in millions of dollars at list price)

Type of Outlet	1966	1967	1967 Change vs. 1966	1967 Share of market
Non-Racks	$303	$ 306	+ 1.0%	29.1%
Racks	393	463	+17.8%	44.1%
Juke Boxes	52	53	+ 1.9%	5.0%
Clubs and Mail Order ..	211	229	+ 8.5%	21.8%
Total Industry	$959	$1,051	+ 9.6%	100.0%

Total Unit Sales—by Type of Outlet
(in millions of units)

Type of Outlet	1966	1967	1967 Change vs. 1966	1967 Share of market
Non-Racks	107	102	- 4.7%	26.9%
Racks	155	171	+10.3%	45.1%
Juke Boxes	54	57	+ 5.6%	15.1%
Clubs and Mail Order ..	47	49	+ 4.3%	12.9%
Total Industry	363	379	+ 4.4%	100.0%

SOURCE: Billboard, "1968-69 International buyer's guide of the music-record industry" (Cincinnati, Ohio) v. 80, no. 35, August 31, 1968: 10.

Another important development has been the fairly recent introduction of the tape cartridge, which was given a big boost by the nation's three major auto manufacturers in 1966 when they began their promotion of tape units in new cars.[1/] As a result tape sales have jumped sharply in recent years and are estimated by the Research Department of Billboard to have reached a level of somewhere around $250 million in 1968.

In addition to these developments, the record industry, as noted at the outset of this section, has experienced a marked deconcentration since the end of World War II. In the late 1940's and early 1950's the bulk of industry sales was concentrated in the hands of the so-called majors--RCA Victor, Columbia, Decca and Capitol--and two other firms classified in the trade as "semi-majors"--Mercury and MGM Records. The balance of industry sales was accounted for by a sprinkling of independents engaged in speciality music, namely, country music, rhythm and blues, jazz and ethnic music. However, with the many revolutionary developments that have taken place since the early 1950's, the character of the industry has changed markedly. The major firms in the industry today--Columbia, Warner Brothers-7 Arts, RCA Victor, Capitol and MGM--control slightly over half of the market, with the balance of the trade going to hundreds of other firms. Estimates vary considerably as to the number of firms actively engaged in the industry. Some estimates run as high as 3,000 firms. But if judged in terms of those firms which follow a fairly regular release schedule, the number of active and relatively successful firms runs in the hundreds,

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1/ Billboard, "1968-69 International buyer's guide of the music-record industry" (Cincinnati, Ohio) v. 80, no. 35, August 31, 1968: 12.

with many firms entering and leaving the industry every year.[1/] Given this pattern of deconcentration over the past several years, it appears that freedom of entry is characteristic of the industry today.

Music Publishing

Prior to the early 1950's, music publishing, like the record industry, was largely concentrated in the hands of a few large companies: Chappell and Company; firms owned by Warner Brothers (Harms, Remick, and Witmark); the so-called Big Three (Robbins, Feist, and Miller, presently owned by Metro-Goldwyn-Mayer); Shapiro-Bernstein; Mills; Famous; Bourne; Irving Berlin; and Bregman-Cocco and Conn. However, due largely to the many marked changes that have occurred in the music-recording business since the early 1950's as described above, music publishing is also far less concentrated and far more fragmented or dispersed. With phonograph records replacing sheet music as the principal outlet for musical compositions and with radio and television being capable of quickly transforming an unknown song into a nationwide hit, market conditions have encouraged new publishers to enter the music field in numbers comparable to those entering the record industry. Again there are no firm estimates as to the number of firms actively engaged in the business. However, various estimates generally range between several hundred to as many as 3,000, with innumerable firms entering and leaving the field annually.

1/ Corry, Catherine S. Op. cit., pp. 36-37, 46-47; and, Senate hearings (1967), part 2. pp. 391 and 426; and, Two billion worth of noise. Forbes, July 15, 1968: 22-30.

Today, although the leading publishers listed above still account for a sizable share of the business, their share has been reduced since the early 1950's as a result of the entry of many new firms in the rapidly expanding music publishing field. The list of leading music publishers has likewise been expanded to include the names of such organizations as: MCA Music; Acuff-Rose Music Publications Inc.; Edwin H. Morris Group; Peer International Corp.; Howard Richmond Organization; Hill and Range Group; Frank Music Corp.; Sunbeam Music Corp.; Laurel Music Corp.; Mills Music Inc.; Cedarwood Publishing Co.; 4-Star Music Co.; Pamper Music Co.; Tree Publishing Co.; and Open Road Music Co.

Another rough measure of the degree of concentration in the music publishing field is the distribution of hit recordings of music published by the "Hot 100 Publishers" as compiled by Billboard. Based on the listings shown in Table 2 of the Appendix, it is seen that there was very little concentration of record hits in the publishing business during the years 1965 and 1968. In both years, Jobete (the publishing wing of Motown Records) and Screen Gems-Columbia (the publishing wing of Colgems Records, Inc.--a subsidiary of Columbia Pictures Industries, Inc.) dominated the listings--1 and 2, respectively. However, with these exceptions, record hits were widely dispersed among the 100 leading publishers during these two years. Moreover, 71 of the publishers listed for 1968 did not appear on the 1965 list. And in the case of the remaining 29 publishers appearing on both lists, 21 exhibited a marked variation in their rankings from year to year. The rankings of 9 firms

in 1968 were markedly higher than 1965 rankings, while 12 firms experienced a considerable drop from their 1965 positions.

Estimates on sheet music sales are extremely rough. However, according to a recent report made by the National Music Publishers' Association, Inc., to the Senate Subcommittee on Patents, Trademarks and Copyrights, "informed industry estimates have placed the retail volume of sheet music sales . . . for 1968 at $78 million."[1/] This rough estimate, however, reflects only retail sales and thereby provides no indication of total gross receipts of the music publishers. As already indicated, sheet music sales, the principal source of income for the music publisher up to the middle 1940's, no longer serve as the major source of revenue to the music publisher and the authors and composers he represents. Today the music publisher derives the bulk of his revenue from two sources: (1) performance royalties, and (2) mechanical royalties on sound recordings. For 1968, industry estimates (shown in Tables 3 and 4 of the Appendix) for mechanical royalties and performance royalties amounted to $44.8 million and $72.4 million respectively.

1/ The complete text of this report (letter dated February 28, 1969) on revenues obtained from sheet music sales is given as follows:

> . . . The Census of Manufactures reports only on publications of four pages or less and shows a decline of this area of music publications from some $17,000,000 in 1958 to about $13,500,000 in 1963. Informed industry estimates have placed the retail volume of sheet music sales for 1958 at about $37,000,000, for 1963 at about $47,000,000 and for 1968 at $78,000,000. The Census of Manufactures for 1967 will include official government figures on all printed music sales, except hymnals and hard bound music books. This information, however, will apparently not be available for several months.

The Census of Manufactures data cited above refer to value of receipts by manufacturer. According to the Census Bureau, the data for 1963 were based on 66 reporting establishments (SIC 274131).

Though royalty payments involving the public performance of copyrighted music on radio, television and by other commercial users are not at issue as far as the mechanical royalty debate is concerned, such royalties, as seen above, do constitute a major source of income to music publishers and songwriters they represent. Hence, data on performance royalties are cited here for the purpose of providing an overall picture of the various principal sources of income generated by music publishing activities.

Traditionally, performance royalties have been collected by three performing rights societies which act as agents for affiliated publishers, composers and authors. These include: ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.) and SESAC, Inc. (a private licensing company). ASCAP and BMI, competitive rivals, dominate the field, with SESAC accounting for only a relatively minor share of the total. After deducting for operating expenses and reserves, both ASCAP and BMI pay the balance of the royalties collected (usually about 80 percent of gross collections) to their affiliated composers, authors and publishers).[1/] According to data compiled by the National Music Publishers' Association (NMPA), total collections for performance royalties by ASCAP and BMI since 1958 have nearly doubled (see Table 4 of the Appendix). Over the period 1958-1968,

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1/ The distribution of these proceeds usually involves a 50-50 split between the music publisher and the composers and authors he represents.

such collections have exhibited an uninterrupted climb, increasing from $39.0 million to $72.4 million, or an average increase of 6.4 percent annually.[1/]

Estimates on mechanical royalty collections for the past decade show a very similar pattern of rise (see Table 3 of the Appendix). Over the period 1959-1968 collections increased from $21.3 million to $44.8 million, representing an average annual increase of 8.6 percent.[2/] The principal collection agency for the publishers and composers is the Harry Fox Office--established in 1948 by the Music Publishers' Protective Association (MPPA). In addition to acting as agent and trustee concerning the issuance of compulsory licenses and the collection of royalties for MPPA members, the Fox Office represents many publishers and composers not affiliated with MPPA. Estimates of total mechanical royalty collections by Harry Fox have ranged from 61.5 percent of total industry collections in 1959 to 75 percent in 1968. For its services, the Fox organization charges a fee which normally

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1/ It should be noted that performance royalties are royalties paid to the copyright owner for the right to perform a copyrighted musical work publicly for profit (i.e., involving the playing of recorded compositions over radio and television, the live performance of a composition by orchestras or performing artists, and other commercial uses of musical compositions--excluding jukeboxes). Performance royalties should always be clearly distinguished from mechanical royalties, which apply only to the mechanical reproduction of copyrighted musical works. Unlike mechanical royalties, which are subject to a statutory ceiling, there are no statutory requirements concerning the actual determination of performance royalties. The amount of royalty to be paid is based entirely upon agreements negotiated between the public user and the copyright owner or the representative of the copyright owner.

2/ Based on data furnished NMPA by Prager and Fenton, auditors for the Harry Fox Office.

amounts to about 3 1/2 percent of total collections made for established publishers and 5 percent for new publishers. In general it is standard practice for the music publishers and composers to agree to a 50-50 split of total royalties collected.[1/]

Patterns of Interwovenship

Though the primary emphasis so far has been placed upon the fact that considerable deconcentration has taken place in the recording and music publishing segments of the music-recording business as the result of the entry of scores of new firms into the business since the early 1950's, there is no escaping the fact that the major functions of the business involving the composition, publishing, recording, distribution and promotion of musical works are considerably more interrelated or interwoven than they were 20 years ago. Very little is known about the extent of interwovenship and its influence upon competitive forces in the music market place. However, the pattern is quite visible; it shows little or no sign of abating; it exists in a number of different forms; and it may have an important impact on the mechanical royalty controversy.[2/]

It is known that many record producers, including all of the majors, are engaged in music publishing activities. It is known that many music publishers have become involved in the record business. This is particularly true in the case of those recording companies and music publishers

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1/ Shemel, Sidney and M. William Krasilovsky. Op. cit., pp. 125-127.

2/ Corry, Catherine S. Op. cit., pp. 130-146; and, Shemel, Sidney and M. William Krasilovsky. Op. cit., pts. 1 and 2.

which have entered the business since the early 1950's. Moreover, in recent years, many songwriters and artists have formed companies which are involved in all facets of the music-recording business.

The pattern of interwovenship has become further complicated by the entry of multi-purpose holding companies into the music field--some of which are engaged primarily in the entertainment business, and others which are not. Most of the corporate aggregations involved in broadcasting, motion pictures and television film production have ownership ties with companies engaged in music publishing and record manufacturing. (It is true that most of the major motion picture producers during the 1920's bought up a number of leading music publishing houses; however, the big move into the music-recording field did not come until after World War II.) Moreover, the five major record producers today--Columbia, RCA Victor, Capitol, Warner Bros. Records, Inc., and Metro-Goldwin-Mayer--are divisions or subsidiaries of enterprises engaged in a wide range of activities in the communications and entertainment field. The same goes for many of the nation's leading music publishing organizations. Patterns of interwovenship include also record companies owning distributors and distributors owning record companies.

The music business, like so many other forms of business activity, is also feeling the impact of the conglomerate merger movement--a relatively new and extremely potent influence which is already forcing radical changes in the corporate and financial setting of the nation's private sector. In October 1968, the American Guild of Authors and Composers

reported to its members that it had discovered that 12 giant conglomerate firms now own 119 music publishers and 59 recording companies, including many mainstays in the music-recording business. Their activity also extends to such music-oriented enterprises as tape cartridges, record distributors and rack jobbers. Based on the chart shown below, it can be seen that of these 12 conglomerates cited, 8 are not engaged solely in music-related or entertainment-related fields.[1/] Their activities, which are typical of most conglomerates today, cover such diverse fields as oceanography, insurance, men's clothing, book publishing, electronics, rubber, petroleum, automatic vending machines, optical products and components, real estate, air transportation, auto parts, and banking.[2/]

As recently as eleven years ago, in 1958, William M. Blaisdell in his study of the music industry characterized the market relationship of the record producers and the music publishers as follows:[3/]

> . . . The present state of the industry indicates that there is a fairly even balance between the two sides in their ability to protect their interests. Currently there is no single producer of recorded music, as there appeared to be in 1909, in a position to monopolize the supply of published

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1/ The number will increase to 9 when the acquisition of Warner Brothers-7 Arts by National General Corp. is completed.

2/ Heinsheimer, Hans W. Music from conglomerates. Saturday review, February 22, 1969: 61-77.

3/ Blaisdell, William M. The economic aspects of the compulsory license, study no. 6 in series, Copyright law revision, studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-Sixth Congress, First Session, pursuant to S. Res. 53. Washington, U.S. Govt. Print. Off., 1960. (Study completed October 1958.) (Committee print, 86th Cong., 1st sess.)

THE CONGLOMERATE STORY

Symbols Used in Listing
* ASCAP
† BMI

OMEGA EQUITIES CORP.
Oceanography, Tidewater Drilling, Raleigh Men's Clothes, etc.

RECORDING COMPANIES
ROULETTE
STARDAY
ALLEGRE
MARDI GRAS
TICO

TAPE CARTRIDGE COMPANIES
NORTH AMERICAN LEISURE CORP.

MUSIC PUBLISHING COMPANIES
ROBERT MELLIN †
JUDY MELLIN *
ROBERT *
SHERWIN *
ELMWIN †
ALGONQUIN †
STASNY *
VICKI †
KEETCH, CAESAR & DINO †
BANDITO †
DIANE BASIE *
BIKINI *
BRAMSTON †
CORDON †
COUNTRY GENTLEMEN †
CUDDA PANE †
DOTNO †
FIGURE †
FROST †
GROCALLA †
GYRUS *
JAMF †
LINDA'S WORLD †
LITTLE DIPPER †
LOVABLE †
JOHN D. MacARTHUR †
ME N–V †
NOM †
PATRICIA †
PLANETARY *
PURE SOUL †
RABBITS FOOT †
STARDAY †
BAYOU STATE †
GOLDEN STATE †
KAMAR †
TRONIC †
TARHEEL †
SANADA †
SANDRA *
SNAPPER †
TODO BIEN †

NORTH AMERICAN PHILIPS
Philips Phonographic Industries.

RECORDING COMPANIES
PHILIPS
ANGEL
WORLD SERIES
MERCURY
SMASH
FONTANA
LIMELIGHT
EMARCY
WING
BLUE ROCK

MUSIC PUBLISHING COMPANIES
CHAPPELL *
BONDOLA, INC. †
BONDOLA, LTD.†
BUXTON HILL *
DeSYLVA, BROWN & HENDERSON *
GERSHWIN *
T. B. HARMS *
MUTUAL MUSIC SOCIETY *
WILLIAMSON *

METROMEDIA
Broadcasting, TV and Radio Stations. Outdoor Advtg.

FILM COMPANIES
WOLPER PICTURES LTD
WOLPER PRODUCTIONS

MUSIC PUBLISHING COMPANIES
SUNBEAM MUSIC †
LAUREL MUSIC *
COLUMBINE †
VALANDO MUSIC *
APPLETREE †
VIDO MUSIC *

WARNER – SEVEN ARTS
(Warner Brothers)

RECORDING COMPANIES
WARNER BROS.
REPRISE
ATLANTIC
ATCO
BRIT
BROOK-LYN
CARLA
CEE-JAM
FAME
FOUR BROTHERS
HEIDI
KAREN
LEMCO
REDDA
TRIUMPH
VORTEX

FILM COMPANIES
WARNER BROS PICTURE CORP.

MUSIC PUBLISHING COMPANIES
COTILLION †
WALDEN *
MUSIC PUBLISHERS HOLDING CORP. *
ADVANCED *
ATHWARN *
HARMS *
NEW WORLD *
NINE STAR *
PEPAMAR *
REMICK *
SHUBERT *
WEIL-BRECHT-HARMS *
WITMARK *
W–7 *
WARNERS – 7 ARTS *
TAMERLANE

TRANSCONTINENTAL INVESTING CORP.
Spectrum Ltd., Minisink Rubber Co., Hullabaloo Dance Centers, Arthur Discothèques, Hullabaloo Magazine, Love's Enterprises, Inc., a chain of restaurants specializing in barbecued foods.

TRANSCONTINENTAL MUSIC CORP.

RECORD PRODUCERS
SIDEWALK PRODUCTIONS

MUSIC PUBLISHING COMPANIES
SIDEWALK PRODUCTIONS

RACK JOBBERS
RECORDWAGON, INC.
MERSHAW
ACTION REC. DIST.
TIP TOP REC. SERV
RECONAR, INC.
PIONEER DISTRIB of KANSAS, INC.
SOMERSET CORP.

MUSIC CORPORATION OF AMERICA, INC.
TV Film Production

FILM COMPANIES
UNIVERSAL PICTURES CORPORATION

RECORDING COMPANIES
DECCA
CORAL
KAPP
CONGRESS
BRUNSWICK
VOCALION
FOUR CORNERS of the WORLD

MUSIC PUBLISHING COMPANIES
ASHLAND †
B.R.C. †
CAVALCADE *
CHAMPION †
DUCHESS †
FONTAINE *
HAWAII †
HIGHWOOD †
LEEDS *
NORTHERN *
PICKWICK *
ROSEWOOD *
SHAMLEY *

COMMONWEALTH UNITED CORPORATION
Theatres. Oil and Gas holdings. Seaburg Corp. mfrs. of juke boxes, phonographs, pianos, electronic organs and vending equipment.

RECORDING COMPANIES
THE HOT BISCUIT DISC CO

INDEPENDENT PRODUCERS
KOPPELMAN & RUBIN

MUSIC PUBLISHING COMPANIES
FAITHFUL VIRTUE †
CHAROON MUSIC †
T M. MUSIC †
TOWNE MUSIC *

TRANSAMERICA CORPORATION
Insurance, Finance, Real Estate, TV Films.

RECORDING COMPANIES
UNITED ARTISTS
LIBERTY
IMPERIAL
VEEP
WORLD PACIFIC
SOUL CITY
BLUE NOTE
UNART
MINIT

MUSIC PUBLISHING COMPANIES
ELVID †
ESTEEM †
UNITED ARTISTS MUSIC *
UNART †
METRIC †
ASA *
BLUE HORIZON †
CORNERSTONE †
DORO †
HAR-BOCK †
MINIT †
POST *
TRAVIS †
WEST COAST *

RECORD DISTRIBUTORS
ROBERTS DIST. St. Louis

FILM COMPANIES
UNITED ARTISTS PICTURES CORP.

GULF & WESTERN
Mfgs. and Distrbs. of auto parts. Integrated zinc producer.

RECORDING COMPANIES
DOT RECORDS
STAX
ACTA
DYNA-VOICE
STEED
VIVA
BRAVO
VOLT

FILM COMPANIES
PARAMOUNT PICTURES CORP.

MUSIC PUBLISHING COMPANIES
FAMOUS MUSIC *
PARAMOUNT *
ENSIGN †
BRUIN †
ADDAX *
PARABUT †
SUN VINE †
VIN-SUN *

VIEWLEX, INC.
Film Strip and Slide Projectors

RECORDING COMPANIES
KAMA SUTRA
BUDDAH
COBBLESTONE

MUSIC PUBLISHING COMPANIES
KAMA SUTRA †
KAMA RIPPA *
TENDER TUNES †

PRESSING PLANTS
SONIC RECORDING
ALLENTOWN RECORD CO.
AMERICAN RECORD CO.
GLOBE RECORD ALBUM COVERS

CROWELL COLLIER & MacMILLAN, INC.
Magazine and Book Publishing, Brentano Book Stores.

SCHOOLS
BERLITZ SCHOOL OF LANGUAGES
KATHERINE GIBBS
BUSINESS SCHOOL
LaSALLE EXTENSION UNIVERSITY

MUSIC PUBLISHING COMPANIES
G. SCHIRMER, INC. *
ASSOCIATED MUSIC PUBLISHERS, INC. †
SCHROEDER and GUNTHER, INC.

UTILITIES & INDUSTRIES CORP.

MUSIC PUBLISHING COMPANIES
MILLS MUSIC *
AMERICAN ACADEMY OF MUSIC *
ANKERFORD *
MULTIMOOD †

AS OF OCTOBER 1, 1968

Prepared by The Public Relations Committee of American Guild of Authors & Composers
50 West 57th St., New York, N.Y. 10019

> music as it emerges from the music publishing houses. On the contrary, there are a number of large and powerful recording companies competing with one another, plus some hundreds of smaller companies.
>
> The record producers must have a continuous flow of new tunes to prosper. The music publishers must license a continuous flow of new tunes for recording to reap the benefit of their copyrights. The two are so interdependent both in relation to their antecedents (e.g., the music publishers' relationship with the songwriters or the relationship between record producers and the broadcasters) and in relation to each other, that powerful as they both are there seems to be little chance that either would be in a position to dominate the other if compulsory license for recorded music were abandoned.
>
> Moreover, the probability of a high degree of centralized control by any one company does not appear to exist either in the ranks of the music publishers or in the ranks of the record producers.

The question naturally follows: Is Blaisdell's conclusion for 1958 still valid today? The events which have taken place in the industry since 1958 would indicate a continuing trend away from oligopolistic control (which began in earnest in the early 1950's) in either the publishing or recording segments of the industry (i.e., when both segments are considered in the traditional sense). However, in light of the fact that vertical integration and other forms of interwovenship have become more prevalent over the past several years, increasing weight must be given to these developments in making an approximation of the relative bargaining strengths of the record producers and the publishers.

These developments could lead to little or no serious market concentration; or they could eventually lead to more or less complete integration or centralized control of recording and publishing functions

in the music-recording business. Given the limited information on the structure of the industry today, it appears on the surface at least that there has been no serious erosion in the relative market strengths of either interest. Evidence obtained by an in depth study of the current patterns of interwovenship in the business--one which is beyond the scope of this study--might lead to a different conclusion. Clearly, the changes that have taken place in the industry over the past decade bring forth, at best, a conclusion that is more qualified and tentative than the one expressed by Blaisdell over a decade ago.

PART II.

PROPOSED CHANGES IN THE LAW RELATING TO COMPULSORY LICENSING AND THE MECHANICAL ROYALTY RATE

First Proposal of the Copyright Office, Issued in 1961

In 1955 Congress authorized the Copyright Office to undertake a program of studies designed to lead to the general revision of the U.S. Copyright law. In total, 34 studies were prepared involving most of the problem areas which could be expected to be involved in the course of drafting a new statute. Based on the findings of these studies and the subsequent reaction to these and other findings on the part of all interested parties, the Copyright Office in 1961 issued a report in which it made numerous "tentative recommendations" concerning possible needed revisions in existing copyright law.[1/]

One area which received considerable attention during this preliminary investigation was the compulsory license for phonograph records. As noted in Part I, author and publisher groups over the years since the enactment of the 1909 statute have pressed for the complete elimination of the compulsory licensing requirement. In their view, the prime reason for the incorporation of such a requirement in the law in the first place was the prevention of monopoly in the mechanical reproduction of music. They contended that there was no longer a need for

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1/ U.S. Copyright Office. Copyright law revision. Report of the Register of Copyrights on the general revision of the U.S. copyright law. [Washington, U.S. Govt. Print. Off., July 1961] 160 p. (87th Cong., 1st sess., House Committee Print. Printed for use of the House Committee on the Judiciary)

an antimonopoly measure, pointing to the fact that radical changes--particularly since the end of World War II-- have taken place in the structure of the music industry and particularly in the relationship between themselves and record producers, which make compulsory licensing no longer necessary. The record industry, which was a relatively weak and uncertain enterprise in 1909, has evolved into a strong and highly diversified industry composed of hundreds of firms actively competing with one another. As far as their segment of the industry is concerned, music publishing interests pointed to the fact that music publishing over the years has likewise grown to encompass many hundreds of active and viable enterprises providing an endless stream of new musical compositions to the music market place.

Given these conditions, authors and publishers alike recommended that serious consideration be given to the elimination of the compulsory license requirement. They argued that the copyright owner of a musical composition should be given the exclusive right to control the commercial exploitation of his work by mechanical means--a right which does not exist under existing statutory authority, but which other creative works covered by the copyright laws enjoy.

In response, record industry spokesmen have argued that the elimination of the compulsory license would have a seriously adverse effect on the record industry and on the music industry in general. Though it was true that the monopoly threat of 1909 no longer existed, the compulsory license over the years has contributed immensely to the promotion of a rapidly expanding and competitive record industry. These record industry leaders

contend further that elimination of compulsory licensing would force radical changes in the structure of the industry and thereby make it again highly susceptible to the dangers of monopoly forces and discriminatory practices. In its defense, the industry cited other benefits of the compulsory licensing system which were beyond the conception of the Congress at the time the 1909 statutory authority was drafted. As related in the Copyright Office's 1961 Report, record industry spokesmen contended that:[1/]

> . . . by giving all record companies the opportunity to make records of the music recorded by any one company, the compulsory license is beneficial in the following respects:
>
> (1) It provides the public with a variety of recordings of any particular musical work, which might not be true if the copyright owner could give an exclusive license to one record company.
>
> (2) It enables smaller record companies to compete with the larger ones by offering other recordings of the same music.
>
> (3) It benefits authors and publishers by giving their works public exposure through several different recordings, thereby increasing their revenue from royalties.

Following its study of the issues involved in this controversy, the Copyright Office in its 1961 Report made the tentative recommendation that the compulsory license provisions in sections 1(e) and 101(e) of the present statute "should be eliminated." In general it observed that:[2/]

> Removal of the compulsory license would be likely to result in a royalty rate, fixed by free negotiation, of more than the present statutory ceiling of 2 cents. The

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1/ U.S. Copyright Office. Op. cit., p. 34.

2/ Ibid., p. 35.

> record companies would, of course, lose the advantage of the lower rate. The price of records to the public might be increased by a few cents, though this is not certain since many factors enter into the pricing of records. If it is true that a freely negotiated rate would exceed 2 cents, we would conclude that the 2-cent ceiling denies authors and publishers the compensation due them for the use of their works.
>
> We have previously mentioned the fundamental principle of copyright that the author should have the exclusive right to exploit the market for his work, except where this would conflict with the public interest. In the situation prevailing in 1909, the public interest was thought to require the compulsory license to forestall the danger of a monopoly in musical recordings. The compulsory license is no longer needed for that purpose, and we see no other public interest that now requires its retention.
>
> For these reasons we favor complete elimination of the compulsory license provisions. However, we recognize that the present practices in the record industry are based on the compulsory license, and that its elimination would require some major adjustments and new contractual relationships. We therefore propose that the present compulsory license provisions be left in effect for a reasonable time after the new statute is enacted.

Acknowledging the fact that the Congress, following its review of this proposal, might decide to retain the principle of the compulsory license, the Copyright Office recommended that the Congress should make several substantial changes in the present provisions. In particular, consideration should be given to four major problem areas:[1/]

- --The royalty rate and the basis on which it is to be computed;
- --The present requirement that the copyright owner file a notice of use as a condition to recovery for infringement;
- --The mechanics for assuring payment of the royalties;

1/ Ibid.

--The copyright owner's remedies against those who make records without permission and without complying with the compulsory license requirements.

Reaction to the Copyright Office's tentative recommendations was predictable. Authors and music publishers voiced their approval of the proposal. Record producers, both large and small, voiced opposition. Following the issuance of the 1961 Report, a series of panel discussions were held on these and other recommendations concerned with copyright revision. In the course of these deliberations, opinions were solicited from all segments of the music industry in an attempt to resolve the sharp conflict which existed over the compulsory licensing issue before the Copyright Office submitted its first suggested draft of legislation to the Congress.

Revised Position of the Copyright Office

The first draft of the proposed copyright revision law (H.R. 11947 and S. 3008) was introduced in the Congress on July 20, 1964. In that bill the Copyright Office recommended that the compulsory licensing provisions of sections 1(e) and 101(e), with certain revisions, be retained in the law, thereby reversing its 1961 recommendation. In its supplemental report to the Congress in May 1965, the Copyright Office gave the following explanation for its reversal: 1/

1/ U.S. Copyright Office. Copyright law revision, part 6. Supplementary report of the Register of Copyrights on the general revision of the U.S. Copyright law: 1965 revision bill. [Washington, U.S. Govt. Print. Off., May 1965] p. 53. (89th Cong., 1st sess., House Committee print. Printed for use of the House Committee on the Judiciary)

> During the discussions following issuance of the Report, it became apparent that record producers, small and large alike, regard the compulsory license as too important to their industry to accept its outright elimination. Moreover, while still opposing the provision in principle, some copyright owners implied that ultimately there might be advantages in ameliorating the harsh and burdensome effects of the compulsory license rather than doing away with it altogether; a number of publishers and some authors now have ties with record companies, and it was suggested that the compulsory license continues to have a favorable impact on competition by fostering the easy entry and growth of small companies within the industry. Moreover, although there appears to have been a trend away from "cover records" because of the type of music most popular at the moment, copyright owners also find advantages in having more than one recorded version of a song available to the public; frequently the first recording is not the hit that makes the song popular. Finally, and perhaps most important, there seemed to be a feeling that people in the industry generally would rather bear those ills they have than fly to others that they know not of.

Though it recommended retention of the compulsory license, the Copyright Office felt that the 2-cent ceiling rate--or mechanical royalty rate--was too low and should be increased to 3 cents per selection per record. Moreover, it recommended the inclusion of a provision authorizing the charging of an optional mechanical royalty rate based on playing time. Specifically the law would provide for an optional rate of 1 cent per minute of playing time or fraction thereof.[1/] This rate represented a substantial increase over the 1/4 cent rate which for a number of years

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1/ Specifically, sec. 11 (3) (2) of H.R. 11947 provided:

> The royalty under a compulsory license shall be payable for every phonorecord made in accordance with the license. With respect to each work embodied in the phonorecord, the royalty shall be either three cents, or one cent per minute of playing time or fraction thereof, whichever amount is larger.

has often been charged under agreements involving such an optional rate. As noted earlier, such an optional rate was not provided for in the 1909 statute.

In justifying the need for an increase in the statutory ceiling rate, the Copyright Office in its 1965 Report reasoned that:[1/]

> It should be borne in mind that exercise of the compulsory license is entirely optional with the record producer, being compulsory only on the copyright owner. The alternative of bargaining with the copyright owner for a negotiated license is always open to the record producer. Consequently the statutory royalty rate operates as a ceiling: the record producer can bargain for a lower rate, but the copyright owner can never bargain for a higher one. The vast majority of recording licenses in the United States have been negotiated and, at various times in the past, record producers have obtained negotiated licenses at less than the existing statutory rate of 2 cents. If the present 2-cent ceiling is raised, licenses could still be negotiated at 2 cents or less if current market conditions did not justify more; and if a higher ceiling resulted in negotiated licenses at more than 2 cents, it could well be argued that a 2-cent ceiling had proved to be too low. As we see it, the statutory rate should be at the high end of a range within which the parties can negotiate, now and in the future, for actual payment of a rate that reflects market values at that time. It should not be so high, however, as to make it economically impractical for record producers to invoke the compulsory license if negotiations fail.

House Committee "Compromise," as Subsequently Approved by the House of Representatives

Beginning in May 1965 and extending through the summer months of that year, Subcommittee no. 3 of the House Committee on the Judiciary held 22 days of hearings on proposed revisions of the copyright laws. Since there was general agreement that the compulsory license would be retained,

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1/ U.S. Copyright Office. Copyright law revision, part 6. Supplementary report . . . . Op. cit., p. 58.

most of the Committee's time on proposed revisions in section 113 of H.R. 4347 was devoted to the question of whether or not the statutory royalty rate on sound recordings should remain at 2 cents per composition per recording or whether it should be raised to the 3-cent level recommended in the bill.

Though they still preferred that compulsory licensing be eliminated altogether, interests representing the publishers and composers informed the Committee that they were willing to support the compromise as stated in the proposed legislation. In voicing their support for the royalty rate increase, they characterized as "astounding" the fact that the Congress for a period of nearly 58 years had not found it necessary to raise the mechanical royalty rate ceiling above the level originally established by law. Considering that 2 cents in 1909, when adjusted for price changes over time, is valued at well over 6 cents today (in 1965 prices), they argued that the injustice of keeping the rate at the 2-cent level should be clear to all. Even an increase in the royalty rate to 3 cents would cover only half the loss experienced due to the depreciation of the dollar since 1909.

Moreover, they contended that consideration should be given to the obvious structural changes that have occurred in the music-recording industry over the past 54 years. In 1909 the publishing business was the dominant sector of the industry. The record industry, on the other hand, was in its infancy and highly uncertain of its future. Today the relative bargaining power of both segments of the industry has changed radically in light of the rapid growth and development of the record

industry over the years--particularly since the end of World War II. As described by one witness appearing before the House committee: "Now the pendulum has swung and the phonograph record industry is a giant in a strong, dominating, bargaining position with the power of life or death over the music publishing industry."[1/] Concerning the changes that have taken place in the business of music publishing over the years, particularly in terms of revenue sources, the same witness made the contention that:[2/]

> Converse to the growth of the record industry has been the decline of the music publishing industry. Sales of sheet music which were the mainstay of the industry have diminished hugely. A hit ordinarily sold over 1 million copies prior to 1950; now a sale of 100,000 copies of a new song is rare. The music publisher's profit on the sale of a single copy of sheet music is 30 to 35 cents; the net mechanical royalty to the music publisher on a recording of a song after payment of the writers' 50 percent share of the mechanical royalty cannot exceed 1 cent under the 1909 law. The growth of sales of records has been a contributing cause to the decline in sales of sheet music. Regardless of the increase in mechanical royalty volume mechanical royalties do not make up for the lost profits in sheet music. Thus the music publisher faces eventual extinction and can be saved only by improving its bargaining position vis-a-vis the record company.

In contrast, interests testifying on behalf of the record industry argued that there was no economic justification for the Congress to raise the statutory royalty rate. They maintained that the inflation argument offered by the publishers does not hold water when one takes into account the very significant influence that the growth and development of the record industry has had on all segments of the music-recording industry.

1/ House hearings, part 1. p. 278.

2/ Ibid.

In spite of the rise in the cost of living, the record industry, due to the impact of many revolutionary technological and marketing advances, has succeeded in not only increasing the number of compositions per record but achieving a marked reduction in the retail price of records to the consumer. In contrast to a recording containing one composition in 1909, the typical long-playing record of popular music--by far the biggest money maker in the recording business today--usually offers at least 12 compositions. According to industry figures, the record producer normally pays 4 cents (12 selections times the 2-cent statutory rate) in mechanical royalties on a LP monaural record retailing at $3.98 (suggested list price) compared to the normal practice of paying 2 cents for a recording containing only one composition and costing the buyer anywhere from $1.50 to $7.00 in 1909.[1/] Hence, taking also into account the very marked rise in record sales over the years, the publishers and authors of copyrighted musical works are being paid a far greater sum than ever before.

Record industry spokesmen argued further that the Congress in 1909 calculated that the 2-cent mechanical royalty would amount to about 5 percent of the manufacturer's net selling price to the wholesalers. Today the industry contends that the cost of the mechanical royalty on a typical long-playing popular monaural record has increased to 15 percent of the manufacturer's net selling price (and 9.7 percent in the case of a "single" or 45 rpm recording). If the rate were increased by 1 cent to a level

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1/ House hearings, part 2. pp. 889 and 906; and, U.S. Copyright Office. Copyright law revision, part 6. Supplementary report . . . . Op. cit., p. 57.

of 3 cents, the industry estimated that the present cost would be raised to 21 percent of the producer's selling price.[1/] Given these factors, record industry leaders contended that the industry's already low profit margins could not adequately absorb such an increase and that it therefore would force many producers out of business and compel others either to increase the price to the consumer or to reduce the number of compositions per record, or both, depending upon market conditions.

In general the opponents of the rate increase argued that such a development would prove harmful not only to the record industry but to publishers and authors as well. As one witness on behalf of the record industry observed:[2/]

> If this increase is enacted, the whole present operation of the making and distribution of records will have to change. Smaller companies will go out of business. The hazards on new companies coming into the field will be so great as to foreclose independent competition. The industry will be forced to concentrate into a few large concerns. These concerns will be inhibited from taking the risks involved in recording the music of an unknown and untried composer.
>
> The recording of classical music which is now done at a loss as a public contribution will have to be seriously curtailed. The bargaining power of the composer will be seriously impaired because there will be only a few strongly entrenched companies with whom he can deal.

The House Committee on the Judiciary, following its evaluation of the testimony presented by both sides in the controversy concluded that an increase in the mechanical royalty rate by an amount somewhat less

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1/ Ibid., pp. 661 and 823.

2/ Ibid., p. 660.

than that recommended in the proposed bill was both justified and needed.

In its final report issued to the Congress on October 12, 1966, the Committee reasoned that:[1/]

> Though it would be surprising if exactly the same amount found appropriate for the statutory royalty in 1909 were found still to be appropriate in 1966, this result is not impossible. The sharp decrease in the value of money in the past half century has undoubtedly been counteracted to a significant extent by the drop in the per composition cost of records and the much greater sales volumes involved. On the other hand, the committee is not prepared to say, even on the basis of the record industry's own figures, that no increase is justified. Other factors must be considered including the fact that, whatever figure is arrived at, it will constitute a fixed maximum enacted during a period of serious inflationary pressures.
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> The record producers have effectively supported their argument that, as of the time of the hearings, an increase of 1 cent in all copyright royalties actually paid could have had a substantial adverse impact on the industry. At least in some cases relatively high risks and small profit margins could force companies to pass the increase on to consumers, and could set up pressures that would result in some business failures and restructuring within the industry. On the other hand, these factors would have to be weighed against the unfairness to copyright owners in preventing bargaining above a fixed maximum amount.

Given these and other considerations cited, the Committee, in its report, concluded:[2/]

> . . . that the present 2-cent rate is too low and that the proposed 3-cent rate is too high. In adopting a rate halfway between the two, the committee does not suggest that 2 1/2 cents should necessarily constitute the prevailing

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1/ U.S. Congress. House. Committee on the Judiciary. Copyright law revision; report to accompany H.R. 4347. [Washington, U.S. Govt. Print. Off., 1966] pp. 101-102. (89th Cong., 2nd sess. House. Report no. 2237)

2/ Ibid., p. 103.

> rate now or in the future. The half cent increase is intended merely to widen the copyright owner's bargaining range without destroying the value of compulsory licensing to record producers.

The Committee also agreed that an alternative rate based on the amount of playing time per composition per record--not provided for in the existing law--should be incorporated into the revised copyright law. Though record industry spokesmen expressed no opposition to the addition of such a provision, they did oppose the 1 cent per minute rate suggested in the original proposal. Such a rate would represent a 300 percent increase over the 1/4 cent rate most commonly charged under existing recording contracts calling for such an optional royalty rate. Such an increase, they contended, would prove too costly to the industry. The Committee concluded that the 1/4 cent rate would require 10 minutes of playing time before the copyright owner could collect more than the alternate rate of 2 1/2 cents per composition recommended by the Committee. Thus the Committee recommended "a half cent per minute rate as a reasonable compromise. Under the amended bill a composition running up to 5 minutes would carry the standard rate [2 1/2 cents per composition], with a half cent added for each minute, or fraction, over 5."[1/]

Finally the record producers voiced strong disapproval of a provision in section 115(c)(2) of H.R. 4347 which provided that "the royalty under a compulsory license shall be payable for every phonorecord made in accordance with the license."[2/] They argued that the basis of the royalty should be in

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1/ Ibid.

2/ This provision was to supercede the vague language in the original statute: ". . . royalty . . . on each such part manufactured."

accordance with the number of records "made and distributed" and not on all records manufactured. The requirement that royalties be paid on all records which go into inventory and are ultimately destroyed is contrary to the economic health of the industry. Particularly since it has been the general practice to negotiate a licensing agreement based on records made and distributed, industry spokesmen felt that Congress should base the mechanical royalty principle on the same general practice. The Committee, however, disagreed with this contention and recommended that:[1/]

> . . . unless a negotiated agreement provides otherwise, the liability for royalties should be fixed at the time phonorecords are made under a compulsory license. A recordmaker should not be free to reproduce as many phonorecords as he wishes without any permission from or obligation to the copyright owner, and then to pay a royalty only with respect to the phonorecords he eventually distributes to the public.

The House Judiciary Committee report recommending favorable passage of the copyright revision law (H.R. 4347) was submitted to Congress just 10 days before the adjournment of the second session of the 89th Congress (October 22, 1966). Final action on the bill was therefore delayed until April 11, 1967, when the House passed a bill which was "substantially identical" to the bill reported by the Judiciary Committee in the previous Congress.[2/] In the section concerned with the compulsory license for phonorecords, the House approved the recommendations of the Committee. The Senate Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary held hearings on a bill (S. 597) identical to that passed

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1/ U.S. Congress. House. Committee on the Judiciary. Copyright law revision; report to accompany H.R. 4347. Op. cit., p. 98.

2/ ----- Copyright law revision; report to accompany H.R. 2512. [Washington, U.S. Govt. Print. Off., 1967] pp. 66-75. (90th Cong., 1st sess. House. Report no. 83)

by the House during the second session of the 90th Congress; however, it chose to take no further action on the bill during the remainder of the 90th Congress pending further study of several areas of controversy which it felt must be resolved before it could recommend final action by the Senate.

In their testimony before the Senate Subcommittee on Patents, Trademarks, and Copyrights, which held hearings on the mechanical royalty rate question during March and April of 1967, both the music publishers and the record producers voiced disapproval of the House Judiciary Committee's final recommendation concerning the setting of a new mechanical royalty rate, but for opposite reasons. The publishers were disappointed by the Committee's decision to recommend an increase in the statutory royalty rate to only 2 1/2 cents (from the current rate of 2 cents) instead of an increase to 3 cents as proposed in the bill originally submitted to the House committee. Particularly in light of the many changes that have taken place in the economy and in the music industry since the establishment of the 2-cent rate in 1909, the publishers viewed the 3-cent rate as being at best a compromise--that they in fact deserved an even higher rate. In his testimony on behalf of the National Music Publishers' Association, Leonard Feist summarized the position of the music publishers as follows:[1/]

> When our industry acquiesced to the 3 cent ceiling as originally proposed in the 1965 bills, we did so to keep this matter out of the area of controversy and to speed up the enactment of the legislation of which this is only a single component--vital though it may be to music publishers. We felt that the proposed ceiling of 3 cents, although too low in our opinion, would at least provide an acceptable compromise and some room for broader negotiation between ourselves and the record industry so that a true economic

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1/ Senate hearings (1967), part 2. p. 373.

> level might be found within it by bargaining. The house committee has made an unreasonable compromise of what we felt was a reasonable one.
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> * * * * *
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> We believe with conviction and sincerity and could argue with validity that 3 cents is too low, particularly in view of the fact that the new copyright statute will be in effect for decades to come . . . .
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> * * * * *
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> We believe . . . a ceiling of 4 cents is not unrealistic. We would agree here and now to the proposed ceiling of 2 1/2 cents if there were an increase of 0.5 cent per year until the ceiling reached 4 cents so that the new ceiling would be reached gradually.

Record industry spokesmen, in maintaining the same position they had expressed to the House committee, protested that any increase over the current 2-cent statutory rate was unjustified and would have a grave impact on the entire record industry. In reference to the House committee compromise on the rate issue, Thurmand Arnold, special counsel to the Record Industry Association of America, testified before the Senate committee that:[1/]

> The phonograph record manufacturers were surprised and bitterly disappointed by the provisions of the copyright bill approved last session by the House committee, which formed the basis for S. 597, and which will increase by 25 percent [i.e., from 2 cents to 2 1/2 cents per selection] a record manufacturer's costs in securing from a music publisher a license for the melody line of a popular song. It also raised the cost of statutory licenses for classical music by 100 percent [i.e., from 1/4 cent to 1/2 cent per minute of playing time for extended recordings].
>
> There is no justification whatsoever in the record for these increases. The evidence in the House hearings on the inequities of the proposed rate increase is an exhaustive study and analysis of the record industry which reflects, in great detail, the profits, costs, and return on investment of the record industry.

1/ Ibid., p. 454.

PART III.

REVIEW AND EVALUATION OF CONGRESSIONAL TESTIMONY CONCERNING THE MECHANICAL ROYALTY RATE ISSUE

Review of Principal Arguments

A review of the extensive testimony presented before the House and Senate committees on the mechanical royalty rate question shows that the debate between the music publishers and record producers on this question centered mainly upon four issues: (1) the economic impact of a royalty rate increase on the record industry; (2) the music publishers' need for a rate increase; (3) the "statutory rate as a ceiling" argument; and (4) the impact of a rate increase on the consumer. This section will review these four areas of debate in some detail, relying almost entirely upon the testimony presented by both sides to the House and Senate committees.

Economic Impact of the Rate Increase upon the Record Industry

During the course of their testimony, interests representing the record industry asserted that in spite of an impressive gain in total sales since the middle 1950's, the industry in general was not in a financial position to absorb any increase in the statutory royalty rate, whether it be a 1 cent increase as originally proposed or a 1/2 cent increase as finally approved by the House during the 90th Congress. To document the industry's case, the Record Industry Association of America, Inc. (RIAA) commissioned Professors John Desmond Glover and David Frederick Hawkins of the Harvard University Graduate School of Business Administration to

conduct an economic analysis of the proposed royalty rate increase.[1/] Thurmand Arnold in his testimony on behalf of the RIAA before the Senate committee stated that: "Members of the Harvard University faculty were selected by RIAA rather than professional economic advisers because their independent positions in the academic world was a guarantee that the study would be objective and not subject to the pressures of their client."[2/] This study, referred to hereafter as the Glover study, covers generally the period 1955-1964 and was completed in June of 1965.

In its summary the Glover study presented the three following reasons why the mechanical royalty rate should not be increased above the current statutory level:[3/]

> 1. An increase would be inequitable. Copyright holders (composers and publishers) are getting substantially greater financial gains out of the phonograph record industry than the companies themselves; greater than performing artists; greater than the supporting talent. Copyright holders are now being paid far greater dollar fees than ever before. Copyright holders are receiving a far greater percentage of the industry's sales dollar than was true in 1909, when the present law was designed to give them 5% of the manufacturer's selling price.
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> 2. An increase would have grave impact on the entire industry, on manufacturers, artists, performing talent, distributors, retailers, and even on copyright holders, themselves. The proposed increase in copyright license fees would call for an increase in annual dollar payments several times the size of all profits of all companies. This would generate irresistible pressure tending to squeeze many companies, especially smaller companies, out of the industry entirely. Similar pressures would operate on marketers, i.e., wholesalers and retailers.

1/ House hearings, part 2. pp. 769-910.

2/ Senate hearings (1967), part 2. p. 454.

3/ House hearings, part 2. p. 777.

The level of activity of the industry and the number of new recordings released would be seriously depressed. There would be unleashed strong forces operating to restructure the industry, even to impair competition.

3. Prices of recordings to the public would rise materially. In the aggregate, the proposed increase in statutory copyright fee would cost the public possibly $30 million per year. The variety of musical offerings would be restricted and the quality of musical offerings would deteriorate. Composers, especially new, unknown ones, would find fewer opportunities for having their works recorded.

These conclusions were based largely upon the financial information supplied the Glover study groups by 20 leading companies in the industry--including all of the major companies.[1/] The study described these companies as the principal producers in the industry and claimed that the inclusion of any of the "literally hundreds of small companies" in the sample survey of the industry "would not materially change the results" shown in the study.[2/]

Based on its interpretation of the financial statements of firms surveyed over the period 1955-1964, the study presented the following

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1/ These companies are:

ABC-Paramount Records, Inc.
Capitol Records, Inc.
Colpix Records
Columbia Records
Continental Record Co., Inc.
Crescendo Records
Decca Records, Inc.
Disneyland Records
Dot Records, Inc.
Folkways Records & Service Co.
Kapp Records, Inc.
Laurie Records, Inc.
London Records, Inc.
Mercury Record Corp.
M-G-M Records
Premier Albums of N.J., Inc.
RCA Victor
20th Century Fox Record Corp.
Warner Bros. Records, Inc.
Word Records, Inc.

House hearings, part 2. p. 802.

2/ Ibid., p. 800.

evidence which in its view supports the record industry's contention that it was not in the position to absorb a royalty rate increase.

1. According to the calculations presented below, the study contends that copyright license fees (i.e., mechanical royalties) paid to music publishers and other owners of copyrighted musical works have increased from 8.0 percent of manufacturers' net sales in 1955 to 11.0 percent in 1964. Payments to artists', musicians' and vocalists' funds exhibited a similar rise. Net profits after taxes on the other hand declined markedly as a percentage of net sales--from 3.6 percent to 1.7 percent.

Percentage of Manufacturers' Net Sales

	1955	1964
	(Percent)	
Contributions to funds	2.1	2.2
Artists royalties	7.4	9.3
Copyright license fees	8.0	11.1
Net profits after taxes	3.6	1.7
Number of reporting companies ..	6	20

SOURCE: House hearings, part 2. p. 801.

This drop in profitability among the firms surveyed was attributed to two developments: "(1) the introduction of long playing records resulting from technological innovation by record companies; and, (2) a reduction of manufacturers' gross margins in response to pressures all along the line on marketers to reduce distribution costs as a result of mass

merchandising of records at lower retail prices."[1/] In sum, profits during the period 1955-1964 declined while payments to copyright holders increased.

2. Moreover, the study pointed to the fact that based on the firms surveyed profitability measured in terms of return on investment exhibited a marked fall-off during the period 1961-1964. Net profits after taxes as a percent of investment fell from 8.2 percent in 1961 to a low of 3.4 percent in 1963 and then increased slightly to 3.8 percent in 1964.[2/] This pattern of return on investment was considered extremely low, particularly in light of the risky nature of the record business.[3/]

3. The study also points out that the "11.1 percent of record companies' net sales represented by copyright license fees in 1964 is particularly significant in light of the fact the present law originally anticipated a copyright license fee of about 5.0 percent of the manufacturer's price."[4/] Moreover, based on a survey of 38 record wholesalers, the study calculated that the current statutory 2-cent mechanical royalty fee as a percent of the companies' net selling price to wholesalers in 1964 amounted to 9.7 percent for a "single" (or 45 rpm) recording (average

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1/ Ibid., p. 801.

2/ Ibid., pp. 801, 807 and 895.

3/ Based on its survey of 6 record companies during 1963, the Glover study reported that out of total releases made by these companies, 70 percent of all "single" releases, 60 percent of all "popular" LP releases and 87 percent of all "classical" LP releases failed to break even in terms of volume sold. The study estimated that these six companies accounted for 32 percent of the industry's total releases during 1963. (House hearings, part 2. pp. 797-799.)

4/ House hearings, part 2. p. 801.

net selling price being 41.3 cents) and 15.0 percent for a long playing popular monaural record (average net selling price being $1.60). If the Congress were to increase the mechanical royalty rate to 3 cents per composition, the study calculated that the fee as a percent of net selling price (based on the same 1964 prices) to the wholesaler would increase to 13.9 percent for singles and 21.0 percent in the case of popular LP's--a decided increase over the 5.0 percent figure cited for the single recording sold in 1909.[1/]

4. Finally, the study cites the fact that gross royalty payments to copyright holders by the companies surveyed increased from $17.4 million in 1960 to $25.2 million in 1964, or an increase of 45 percent. Net profits after taxes for these companies, on the other hand, declined in the same period from $6.1 million to $4.0 million--a decline of 33 percent. Thus if Congress were to approve a 50 percent increase in the statutory royalty rate (i.e., from 2 to 3 cents) the sample record companies--based on payment of $25.2 million in royalty payments in 1964--would pay $12.6 million more in fees ($25.2 million X .50 = $12.6 million). Since net profits in 1964 amounted to only $4.0 million, "obviously, the increase in royalties could not come out of profits."[2/] Hence, the increase would have to be passed on.

The Glover study also analyzes the effects of the royalty rate increase on larger, medium and smaller record companies contained in

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1/ Ibid., pp. 822-828 and 884-885.

2/ Ibid., p. 800.

the sample. Based on its review of the financial data for 1963 and 1964 it concluded that:[1/]

--Most profits are made by larger companies.

--But even larger companies cannot support an increase in copyright license fees.

--Medium size record companies are still less able to support an increase.

--Small companies--which predominate in the record industry--cannot at all support an increase.

--For small companies, especially, an increase would require a drastic revision in ways of doing business in order to remain in the record industry.

Given these and other considerations, the study concludes that:[2/]

> . . . if the copyright license fee is increased, record companies and record marketers would have to respond so as to protect themselves. Record manufacturers would have to take steps such as: reducing the number of risky offerings of new, unknown composers and artists; reduction in the number and length of the selections of music on recordings; fewer recordings of serious and classical music; and, greater use of public domain music. In addition, record manufacturers and record marketers will be forced to pass the increase on to consumers.
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> All of these responses, which seek to lessen increased risks and costs arising from higher copyright license fees, would lead to a restructuring of the industry. There would be a tendency to "concentration" as a result of the increased economic pressure upon weaker record companies and marketers.

The music publishers during their testimony before both House and Senate committees were strongly critical of the record industry's contention that an increase in the statutory rate ceiling would have a

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1/ Ibid., p. 813.

2/ Ibid., p. 824.

grave impact on all firms in the record industry--both large and small. They pointed to the fact that the industry for many years has exhibited impressive growth in both sales and in the large number of new firms entering the recording field--particularly since the early 1950's. The record industry, in many ways, is a reflection of the highly competitive activities which are characteristic of many American industries. Under the American free enterprise system financial success is never guaranteed to any new business venture--the forces of competition in the market place will always be propelling many enterprises to greater heights while at the same time others will be forced to experience failure. The fact that for many years there has been a "continuing flow" of firms entering the record industry each year provides a good indication that the financial prospects are promising enough to encourage such firms to take the risks involved.1/

The music publishers argued further that despite the considerable amount of financial information provided by the record industry, the very nature of the industry itself precluded anyone from obtaining a reliable profit picture of the industry. Many record companies today in addition to their manufacturing role, have entered the music publishing field and have become involved in all phases of marketing as well. Moreover, a significant number of the industry's leading firms are subsidiaries or divisions of large diversified corporate combines engaged in a wide range of entertainment functions--e.g. broadcasting, film making and music

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1/ Senate hearings (1967), part 2. pp. 418-419.

publishing. Thus for many firms in the industry, profits are no longer derived solely from the manufacture and sale of phonograph records. The high degree of interwovenship in the industry today enables many record companies to derive income from many other market functions in the music field.[1/]

Robert R. Nathan, testifying on behalf of the National Music Publishers' Association before the Senate committee, concluded the publishers' argument by asserting that:[2/]

> . . . Reliable profit figures are always elusive, and meaningful comparisons are very difficult. Only if there were a regulatory commission with its own competent staff could this subject be pursued successfully. Still, the relevance of profit information is dubious unless the Congress is prepared to call for flexible price fixing in both music publishing and recording. I cannot believe that this Subcommittee or any other Committee of the Senate or the House would seriously consider such a proposal for one minute.

However, because the record industry had "made such a strong issue of profits and of the ability to pay higher royalties," Mr. Nathan felt it necessary to submit for the record certain observations which in his view painted an entirely different picture of profitability in the record industry.[3/]

> The report of the 1965 Annual meeting of RCA Shareholders states:
>
> In the past five years, the ratio of RCA profits to sales doubled--from 2.3 percent in 1960 to 4.6 percent in 1964. In terms of dollars alone, profits increased by 135 percent during this five-year period.

1/ Ibid., pp 391-392 and 419.

2/ Ibid., p. 419.

3/ Ibid., pp. 419-420.

This report goes on to say:

> The RCA Victor Record Division, another long-time member of the RCA Family, is currently enjoying its greatest consumer acceptance in history. First-quarter sales were at an all-time high, and earnings for the first quarter were substantially greater than last year. This trend is expected to continue throughout the remainder of 1965.

Billboard has this to say about ABC Records (12/10/66):

> With sales running more than 150 percent ahead of 1965, and with profits about twice the best previous year, ABC Records is on the last lap of the most successful 12 months in the label's history.

The 1964 annual report for Warner Brothers includes the following:

> The Warner Brothers-Reprise Record operation, in its ninth year and achieving recordbreaking sales, is one of the parent company's chief assets and a fantastic money-maker. (Emphasis supplied.)

The 1965 report of CBS, which owns Columbia, stated:

> Columbia Records . . . enjoyed an outstandingly successful year in both sales and profits.

The MCA Inc. 1965 annual report had this to say about its subsidiary, Decca Records:

> The results of operations of Decca Records were the best in its 31-year history.

The 1966 annual report of MGM Records says:

> Record operations were profitable last year . . . . The record division attained the highest sales and profits in the history of the Company in 1966 . . . sales figures from 1963 through 1966 showed an increase of over 100% with an even greater increase in profits.

A Billboard (October 22, 1966) article quotes as follows:

> Decca Ltd.,--parent company of London Records--has reported a $1,260,000 increase in profits for the fiscal year (1966).

Billboard of October 19, 1966 stated:

> Fiscal year 1966 was the strongest sales year in the history of Liberty Records. The company achieved gross sales of $20 million, a 67 percent increase over 1965.

> Audio Fidelity Records is winding up the best sales year in the history of the label.
>
> Atlantic Records wound up the year with sales up 50 percent over 1965. It was the biggest sales year in Atlantic's history.

Billboard of December 31, 1966 reported:

> The first three months of MGM Record's 1967 fiscal year have racked up the greatest sales figure in the 20-year history of the firm--up 72 percent over the first quarter of past fiscal year, said President Mort Nasatir.

Even the low-priced specialist fared well, as reported by Variety February 1, 1967:

> Pick Int'l 6-mos net soars to record $243,251. Pickwick International, manufacturers and distributors of low-priced albums, racked up record sales and earnings in the six months ending last October 30. Net was $243,251 on sales of $4,037,917 compared to profit of $184,691 on sales of $3,512,311 for the same period in the previous year.

Do the foregoing statements sound like the whisperings of dying firms? Not when one observes such words and phrases as 'fantastic money-maker,' 'excellent year,' or 'the best in its 31-year history.'

The Music Publishers' Need for a Rate Increase

As already stated, the music publishers, in both the House and Senate hearings, repeatedly stressed the view that both the compulsory licensing and the statutory royalty fee should be striken from the copyright law,[1/] especially since the purpose for which the law was enacted--namely, the prevention of a monopoly in musical recordings--is no longer applicable to the current economic setting of the music-recording industry. However, because of the unwillingness on the part of the record industry to agree

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1/ See above, pages 30-31.

to such an action, the publishers sought a "reasonable and realistic compromise" which would allow for the retention of the compulsory licensing system, provided that it was agreed that the rate ceiling would be increased from 2 to 3 cents (or 1 cent per minute of playing time, or fraction thereof, whichever is greater).

In stating the music publishers' position, Robert R. Nathan testified before the Senate committee that:[1/]

> As an economist, I believe that both the statutory fee and compulsory licensing should go. If the compulsory license provision is retained, I also believe that a sound and conclusive argument can be made that the ceiling should be substantially increased. This has been the position taken by the composers and publishers (and, I might stress, by the Register of Copyrights) many times since the 1909 statute was enacted. To expedite action, my clients came up with a reasonable and realistic compromise. This was to raise the statutory rate to 3 cents, or 1 cent per minute of playing time or fraction thereof, whichever is higher. Although preferring complete deletion, the Register of Copyrights adopted the suggested compromise. However, the recording companies have refused to accept even this compromise. They stick rigidly to the 2-cent ceiling and plead poverty.
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> * * * * *
>
> Certainly, a ceiling well above 3 cents would be warranted. However, the music publishers expressed a willingness before the House Subcommittee to accept the 3-cent ceiling. This was not a bargaining level, and the compromise of 2 1/2 cents now in the pending House Bill is not at all acceptable. If the music publishers' proposal is looked upon as a point from which to bargain, then they should properly ask for at least a 4-cent royalty rate in order to arrive at the 3-cent final arrangement, which is a rock-bottom figure.

The representatives of the record industry, on the other hand, repeatedly made the assertion that the rate increase could not be justified

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1/ Senate hearings (1967), part 2. pp. 397-398.

on the basis of information supplied by the music publishers to the House and Senate committees. The music publishers, in their view, must demonstrate financially why a higher statutory rate is necessary. Record industry spokesmen pointed to the fact that the Glover study has shown that the publishers today, in spite of a marked rise in the cost of living and marked changes in the structure of the music-recording industry since 1909, receive a much larger share of the manufacturer's selling price than they did in 1909. Based on its review of the legislative history of the 1909 copyright law, the study--as already noted--contends that the 2-cent statutory rate amounted to about 5 percent of the selling price to wholesalers of a recording produced in 1909. And in terms of 1964 prices and licensing costs, the study estimated that the mechanical royalty amounted to 15 percent of the selling price, based on a popular LP (wholesaling at $1.60) containing 12 selections (paying the 2-cent statutory rate for each selection).[1/]

The Glover study also pointed to the fact that total mechanical royalties paid by the 20 firms surveyed amounted to 6 1/2 times the after-tax profits of the surveyed manufacturers in 1964.[2/]

In response, the representatives of the music publishers voiced strong objection to the attempt made by the record industry to compare its net profits to gross payments to music publishers for mechanical royalties.

1/ See above, pages 50-51.

2/ House hearings, part 2. p. 809.

Such a comparison was claimed to be totally meaningless. Robert R. Nathan on this point testified before the House Committee that.[1/]

> . . . I must say I have seen data much abused in my time but I have seldom seen data abused as much as an analysis of gross and net incomes I saw presented before this committee.
>
> The profit data in one testimony presented here was to the effect that one can compare the gross fee to the music publishers with the net profit of the record companies.
>
> Now, gentlemen, if I turned it around and said to you, let us compare the gross revenues of the record companies with the net profit of the publishers you would see something utterly insane. The former would be a thousand times greater than the latter. Well, it is only in differing degree that this nonsense manifested itself in the data and comparisons that were placed before you in earlier testimony.
>
> The music publishers' gross receipts are not profits. They share first of all with the artist, with the creator, with the composer. Half and sometimes more of the royalty goes to the composer. Even then the balance cannot be compared with the net profits of the recording companies. Music publishers have all kinds of expenses. They have payrolls; they give advances to the composers. Often this is lost. They pay retainers to composers to keep them in their so-called stable of writers, which advances and retainers by no means are always recovered.

In a supplemental statement forwarded to the House committee, the Record Industry Association of America, provided the following response to this argument made by Mr. Nathan.[2/]

> . . . a representative of music publishers criticized the comparison of third party payments, including the payment of mechanical license fees to publishers, to the net profit of record companies in the Glover Report. He seemed to insinuate there was something erroneous or sinister in this comparison. The purpose of these figures is <u>not</u> to

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1/ House hearings, part 3. p. 1749.

2/ House hearings, part 2. p. 920.

> mislead anyone as to the relative profitability of record companies and publishers by comparing the gross receipts of the publishers to net profits of record companies. The purpose was to reveal the magnitude of payments to third parties in relation to net profits of record companies. These data reveal accurately, specifically what was intended: that payments to third parties are already so large in relation to the net profits of the record companies that it is mathematically impossible to increase these payments substantially by taking them out of the net profit of the record companies.
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> * * * * *
>
> As to the relative profitability of record companies and music publishers: Extensive data as to the profitability and rate of return of record companies were put into the record by Dr. Glover and his associates for all to see. No representative of the music publishers has offered any data whatever bearing on the profitability of music publishing. The subcommittee is entitled to know what percentage of music publishers' gross receipt goes into net profits; the subcommittee is also entitled to know the rate of return on investment in the music publishing business. If this rate of return is so low as to excite the sympathy of the subcommittee and other reasonable men, then further analysis of the facts in the case will obviously be called for.

Though the music publishers refrained from providing any financial statements indicating the trend of gross receipts, costs, and profits for a period of years, Mr. Nathan in his House committee testimony did make certain observations concerning operating costs in the publishing business.[1/]

> Just as the record companies have many production, distribution, and administrative costs, so music publishers encounter many expenditures in providing essential services to the music industry. A listing of these services, each of which is a business cost, is revealing. The common first link in the chain from the creative songwriting team to the record maker is a retainer paid by the music publisher as a kind of bonus to many of the songwriting teams. The more successful the writing team, the higher is the retainer. It is not unusual to pay up to $20,000 as a retainer to a songwriting team.

1/ House hearings, part 3. pp. 1743-1744.

Also paid to the team by the publisher is an advance against (hopefully) future royalties. The annual writeoff of royalty advances is a heavy recurring cost to music publishers, said to run into many hundreds of thousands of dollars. The publisher very often pays for the office overhead of the writing team as they do their work--office space, telephone, secretarial service, heat, light, etc.

Let us suppose that a songwriting team comes up with a tune that the highly paid professional music staff on the payroll of the publisher believes might sell. The next sizable cost to the music publisher is the making of a demonstration record (demo). At one time, the promotion of a composition to a record company could be done with only a singer and a piano accompaniment. Today, however, the music publisher must make the demonstration record and this involves deciding on the arrangement best suited to the song and paying top artists to make the demo recording. Once the exclusive task of the record manufacturer, today the artists and repertory function (A & R) is frequently the responsibility of the music publisher. Good artists command a percentage of the music publisher's share of future royalties--as much as 50 percent.

Once the demo is out, it is the responsibility of the music publisher to find a recording company that will manufacture the record. This again calls for professional sales talent expensive to the publisher.

Our song is now recorded, but the contribution of the music publisher is far from finished. He must expose the record to radio stations and other potential users. To do this, he employs expensive professional music salesmen to call on diskjockeys throughout the country. These salesmen also expose the record to motion-picture producers. As a rule, the publisher will purchase records for promotional mailings, domestically and internationally.

Sometimes the publisher shares advertising costs with the record company. He also advertises his songs independently.

From a half to two-thirds of the Harry Fox Office fee of 3 1/2 percent of sales is borne by the publisher. Along with the composers and writers, the publisher pays the costs of ASCAP and BMI.

Many legal and auditing fees are paid by the music publisher, which fees are often sizable because of the non-reporting or under-reporting of the numbers of records sold

> by some of the less reputable and less permanent record companies. And remember, gentlemen, that all these costs are incurred by the publisher after the payment of half and often more than half of gross royalties to the song-writing team.

During the course of the Senate hearings the arguments between the publishers and record producers concerning the publisher's need for a rate increase were more or less the same as those presented before the House committee. In stating the position of the record producers, Thurman Arnold observed:[1/]

> The evidence before the House proved that the music publishers are even now, under the 2-cent rate, getting a completely disproportionate share from the operation of the copyright law. Thus, in five years from 1960 to 1964, the music publishers and copyright holders received a total of $102.4 million from the record companies as payments under the statutory licensing provisions. During the same five years, the net profits of all record companies were about $31 million.
>
> * * * * *
>
> The only relevent evidence to rebut the charge that music publishers and copyright owners were getting an inequitable and exorbitant reward for their contribution to sound recording of music would have been the comparable cost and profit figures of the music publishers. We, therefore, asked the publishers to supply to the Register [of Copyrights] their net profits, as we had done. The music publishers refused. We induced the Register to ask for the net profits and cost of the music publishers . . . . The publishers again refused to supply the Register or the House committee any data on the ground that their costs and profits were irrelevant. This is a plain admission that the music publishers are now, even under the 2-cent rate, obtaining a disproportionate part of the copyright reward compared with the record manufacturers.

1/ Senate hearings (1967), part 2. pp. 458-459.

The National Music Publishers Association in its final testimony before the Senate committee responded with the counter argument that:[1/]

> The music publishers who receive one-half of the royalties and the composers and lyric writers who receive the other one-half never suggested before the House committee or this Senate committee that their financial need is a relevant issue. They have not argued on the basis of poverty.

Robert R. Nathan, in presenting these views of the NMPA, stated further that:[2/]

> I urge this committee to take note that ability to pay is not the issue. If this were pertinent then it would be essential for Congress to set up a mechanism or an agency whereby rates and costs and profits could be studied carefully and thoroughly as is done before public utility commissions and ratemaking bodies. Certainly Congressional hearings are not appropriate for probing detailed facts company by company and industry by industry and for applying standards which guide a regulatory body in determining appropriate rates. I have never seen anything in all the copyright legislation or hearings on this issue which give guidance to setting royalty rates. There are no criteria, legislative or otherwise, which provide a basis for deciding what a fixed and uniform royalty rate ought to be on the mechanical reproduction of music.

The "Statutory Rate as a Ceiling Rate" Argument

In justifying the need for a rate increase, the music publishers argued that an increase in the royalty rate from 2 to 3 cents would not necessarily constitute an absolute 1 cent increase in the mechanical royalty rate on copyrighted music. They contended that the present 2-cent statutory rate is actually a "ceiling rate" and that a major

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1/ Senate hearings (1967), part 4. p. 1094.

2/ Ibid.

proportion of the recorded musical compositions are made under negotiated agreements calling for royalties of less than 2 cents per composition.

Moreover, unlike the record producer who is not faced with a fixed maximum on the prices he charges for his records, the music publisher, when it comes to the fee he may charge the record producer for the right to record a copyrighted composition contained in the publisher's catalogue, must operate under a fixed ceiling, whether it be the current 2-cent rate or a 3-cent rate. Hence, the increase in the "ceiling rate" would serve to broaden the range of bargaining between the principal parties. In other words, an increase in the statutory rate to 3 cents would not necessarily mean an automatic increase in all license fees to the new 3-cent level. The negotiated license fee will depend largely upon the relative bargaining strengths of the parties involved--keeping in mind that the record producer could not be forced to pay a fee greater than the proposed 3-cent ceiling.

The record producers disagreed with the publishers on this point. They argue that with the exception of certain "stereotyped variations from the standard 2-cent rate," the bulk of all records produced and sold are covered by standard written agreements which make them subject to the payment of the statutory maximum per composition. In their view the same situation would prevail at a higher rate authorized by Congress.

Again, their argument on this point was based largely upon the findings of the Glover study which concluded that "the present provisions of the copyright law establish the fees actually paid in practically all instances. Only in infrequent exceptions are fees paid which are not

clearly tied to the compulsory license fee of 2 cents. The proposed new statutory fee would similarly establish the fees actually paid."[1/]

This conclusion was based on a survey of 1,400 selections (not total records sold) issued by two major record companies during randomly selected months in 1964 and 1965. This survey reported that 73 percent of all copyright licenses issued on the selections were subject to the standard 2-cent rate and that the remaining 27 percent of the license fees paid were at rates less than 2 cents. In the latter instance, however, the Glover study reported that "the vast majority of these apparent variations from the compulsory 2-cent fee represent payments at recognized rates related to the 2-cent compulsory fee for regular, stereotyped variations from the standard of 2 cents."[2/]

On the latter point the study observed that:[3/]

> . . . 69.8% of all the variations from the 2¢ fee represented recognized lower rates (1-1/2¢ or 1-3/4¢) paid when more than one selection of a given publisher is used on an 'LP'; 13.6% of the fees paid at less than the 2¢ rate represented recognized fees for LP's with list prices of $2.85 or less: 13.4% of the selections entailed no fees because they were in the public domain; 2.6% of the fees paid represented recognized fees paid when an LP contains more than the usual 12 selections or 'bands'; only 6/10 of 1% of the fees paid were at rates other than the foregoing.
>
> If fees actually had been 'negotiated', one would expect to find publishers obtaining different fees from different record companies for the use of similar selections under similar or identical circumstances . . . . In actual practice, the 2¢ fee is not a 'ceiling', nor

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1/ House hearings, part 2. p. 831.

2/ Ibid., pp. 831-832.

3/ Ibid., p. 832.

> is it a 'floor'. It is the almost invariably prevailing standard which establishes the fee actually paid. Either 2¢ is paid or some other amount is paid which represents a stereotyped variation therefrom. In the sample studied, such fees were paid in 99.4% of the cases.

The Glover study reasons further that the scale of operations in the industry have more or less precluded the publishers and the record producers from entering into "negotiated" agreements in the case of every copyrighted selection released by the record producer. It bases its contention on the following factors:[1/]

> (a) In a typical year, there may be 55,000 selections released in the popular field, alone. It is manifestly impractical for record companies to 'negotiate' individual prices in each instance with publishers.
>
> (b) There is only infrequently any systematic and compelling rationale for publishers to differentiate or discriminate among selections and releases or record companies, or for a record company to differentiate or discriminate among selections or releases or among publishers.
>
> (c) It is, in fact, practical for the trade to work toward a standard fee to be paid in a standard situation, with standard differentials to be paid for stereotyped variations therefrom.

Thus, because of these conditions and practices, the study on this question concludes that:[2/]

> . . . if the statutory rate were increased to 3¢, the standard actual rate would rise to 3¢. New standard differentials from the 3¢ rate would be established for stereotyped variations from the standard circumstances. These events would come to pass because all of the present conditions would still prevail.

1/ Ibid., p. 832.

2/ Ibid., p. 833.

In testimony before the Senate committee, the music publishers raised two basic objections to the "ceiling" question as interpreted by the record producers: (1) that considerable individual bargaining does exist between the publisher and the record producer concerning the payment of mechanical royalties, and (2) that a sizable number of compositions recorded by record companies are negotiated at rates below the present 2-cent ceiling rate.

On the first point, based on their study of the information contained in the files on mechanical royalty agreements and payments maintained by the Harry Fox Office[1/] the publishers argued that record company requests for licenses with rates below the statutory ceiling is a common, not an occasional, practice. Robert R. Nathan, in presenting the publishers' viewpoint before the Senate committee, stated that it was not possible to "incorporate into a table the vast amount of correspondence, telephone calls, and notations of meetings which are part of the [Harry Fox Office's] request files," but he did feel that the following presentation based on a review of the request files of the Columbia Record Company for May 1966 and for Dot Record Company for April through July of 1966 was indicative of industry practice on this matter:[2/]

> In the month of May alone, Columbia submitted at least 67 requests to publishers for variations from the statutory rate, and almost 90 percent were approved after negotiation. Twenty-four of the requests approved were used as part of 10-record sets for Columbia Record Club, but even here the

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1/ The Harry Fox Office, discussed in more detail above on pages 23-24, estimates that it collects from 70 to 75 percent of all mechanical royalties paid by the record industry. (See Table 3 in the Appendix)

2/ Senate hearings (1967), part 2. pp. 400-401.

requested variations were not uniform. For example, out of the 24 requests approved for this particular use, 16 were at 1 cent, 6 were at 1 1/4 cents and 2 were at 1 1/2 cents. Negotiated rates for similar uses do not appear to be standardized. Similar variations are manifested throughout the table.

In the case of DOT Record Company, 73 requests for variations were submitted to publishers for consideration, and 52 of them, or only 71 percent, were approved. Of the 52 approved variations, over one-third were at 1 1/2 cents, with no reason specified in writing as to why the request was being made. DOT Record Company did request variation from the 2-cent rate for use in their low-priced Hamilton line. Thirteen such requests were submitted in the three months under examination, and even here, no uniform pattern emerged. Almost half of them were granted at 1 1/2 cents and the remainder at 1 cent.

It should be stressed that many of the requests for approval were finally negotiated at rates lower than those originally sought by the record firm. It would appear that the bargaining must have taken into account a variety of complex and interrelated factors.

In addition to the above examples the Nathan study presented for the record other examples of rate reductions which were arrived at by means of negotiation. These included agreements involving: (1) no royalties paid for free records used for promotional purposes by record companies; (2) reduced royalties on records sold through record clubs; (3) lower royalties for budget or low-priced records; (4) lower royalties on records sold through post exchanges--a big market for records; and (5) variations on exported records and "discontinued" records.[1/]

Given these findings, Nathan concluded that "there is widespread and effective bargaining [underlining added] between publishers and record

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1/ Senate hearings (1967), part 2. pp. 385-386, 401-405; and, part 4. p. 1092.

makers, that royalty rates vary widely in amounts and terms, and that the statutory rate is truly a ceiling and not a fixed price."[1/]

To further substantiate the music publishers' position, Mr. Nathan presented the findings of two sample surveys designed to refute the record industry's contention that the publishers are paid the statutory 2-cent fee "or a stereotyped variation therefrom."

In the first survey a review was made of 155 selected licenses, on a random basis of all licenses issued by the Harry Fox Office during the first two quarters of 1966. Mr. Nathan in his testimony reported that:[2/]

> A review of 155 licenses, each one representing a different selection or tune, revealed the frequent existence of a multiple-rate category which provided for four different rates depending upon the price of the record sold as well as special rates for extended and long-play records. Nearly one-fourth of the licenses examined included such a variable four-rate provision. In effect, the multiple-rate license gives the user permission to record the selection for sale at any or all of the options. Therefore, copyright fees under one single license could actually range from 2 cents to 1 1/4 cents, depending upon the use or uses to which the particular license is put. Nowhere in the exhibit the record makers presented to the House Subcommittee, presumably covering 1400 different selections, is there any mention of this particular license form which is used widely in the industry and which, in effect, is an authorization for multiple rates.

The sample showed that 50 percent of the licenses were specifically written at 2 cents, 23 percent fell within the four-rate or multiple-rate category and the other 27 percent specified single rates below the 2-cent maximum. Concerning the multiple rate category a survey was made of 36

1/ Senate hearings (1967), part 2. p. 405.

2/ Ibid., p. 406.

licenses falling within this category and it was found that "there were 16 cases where record companies actually used the license to pay not only the 2 cent rate for certain uses, but also a 1 1/2 cent rate for other uses."[1/]

The 155 licenses were also surveyed on the basis of rates actually paid under the licenses (involving 184 different uses), and on this basis it was reported that 60 percent of the uses were at the 2-cent level and 40 percent were under 2 cents. From this, the Nathan study concluded that: "Had the record makers analyzed the multiple-rate licenses rather than simply listing them in the 2 cent category, they might have reduced their figure from 73 to 60 percent. Our study clearly substantiates that the 2 cent rate is the ceiling and there is no such thing as 'the rate.'"[2/]

Since this particular survey was based only on the number of different musical selections covered by 155 licenses and was not weighted on the basis of the volume of records produced and sold, Mr. Nathan introduced for the record the results of a second study which involved a sample survey of the royalty payments paid to selected leading music publishers on all selections recorded and sold by the three largest companies during the second quarter of 1965. The music publishers included in the survey were the six publishers receiving the largest payments from each of the three record companies studied. To insure a proper interpretation of the mechanics and scope of this sample survey, the description of the study as contained in the Senate hearings is given as follows:[3/]

1/ Ibid.

2/ Ibid.

3/ Ibid., pp. 410-411.

A large and adequate pool of data for the study was available from the Harry Fox Office since, as agent and trustee for music publishers, 70 to 75 percent of all mechanical royalties are paid through that office. The first step in selecting the sample was an examination of the records of payment by record companies maintained in the Fox Office. Three basic decisions were made: the selection of the time period to be sampled, and the selection of record companies and music publishers to be included in the sample. The second quarter of 1965 was selected as the time period for the analysis, representing the most recent payment figures available when the study was undertaken. To obtain a large sample of total sales of the record industry, the three largest record companies were selected. Their royalty payments accounted for 49 percent of the total payments through the Harry Fox Office in the second quarter of 1965. From a listing of all publishers receiving royalties from these three record firms, the six companies receiving the largest payments from each of the three record companies were selected. These six companies, which were different for each record firm, received from 22.4 to 27.4 percent of the total quarterly payments made by each of the largest three record companies to the largest royalty-receiving music publishers, an average of 24.4 percent.

* * * * *

The basic data for this statistical analysis thus consisted of 18 sets of detailed sales information as reported by record companies to the Harry Fox Office for the second quarter of 1965, accounting for one-fourth of the total royalty payments made by the three record companies whose total royalty payments, in turn, represented almost one-half the total payments by all record companies reporting through the Harry Fox Office. Since the six largest publishers for each of the three record companies varied, 13 different music publishers were included in our sample. The sample, therefore, accounts for over 12 percent of the total payments received by the Harry Fox Office for the second quarter of 1965--an uncommonly large sample for statistical analysis.

Both the number of selections and the value of the royalty payments for each selection were tabulated and classified by the size of the royalty fee actually paid. In the interest of comprehensive coverage, it was decided to tabulate all sales of <u>all</u> selections included in the 18 quarterly reports.

During the second quarter of 1965, the three major record companies surveyed paid mechanical royalties on 31.6 million selections. Of this total, 11.2 million selections, or 35.4 percent, were subject to the maximum 2-cent royalty. The remainder, 20.4 million, or 64.6 percent, paid royalties of less than 2 cents per selection produced and sold. And of this total, one half paid a rate of 1 1/2 cents or more, while the remaining half paid rates less than 1 1/2 cents per selection.

In terms of the actual amount paid in royalties, the three companies surveyed paid a total of $476.8 thousand on 31.6 million selections produced and sold during the second quarter of 1965. Of this total, 47.9 percent of the collections ($228.4 thousand) were from recorded selections carrying the 2-cent rate. The balance of the collections--52.1 percent (or $248.3 million)--were based on rates of less than 2 cents. And 92 percent (or $227.8 thousand) of the royalty collection falling within this range were based on rates of 1 1/2 cents or less. In terms of total collections--$476.8 thousand paid on 31.6 million recorded selections--the average mechanical royalty rate paid per selection covered by the three-firm survey was 1 1/2 cents, not 2 cents.[1/]

Finally, this study reported that the data surveyed of the three record companies and the 13 music publishers showed "conclusively that not only is there a wide range of rates below 2 cents, but also that the rate pattern varies from one record company to another and even within the transactions of the same record company with different publishers."[2/]

1/ Ibid.

2/ Ibid., p. 412.

Based on these findings, the Nathan study concluded: "It is this persistent variation which serves to demonstrate conclusively that standardization at the 2-cent ceiling [as asserted by the record producers] is a myth."[1/]

The Impact of a Rate Increase on the Consumer

On the question of the consumer, the record industry asserted that an increase in the mechanical royalty rate would have a very noticeable impact on the consumer both in terms of higher prices and reduced quality of the product (including possibly a reduction in the number of selections offered on a LP recording). Generally it was assumed that the increased costs derived from a rate increase would have to be passed on to the consumer. In short, based on data obtained from a sample of 38 wholesalers (including 25 rack jobbers and 13 independent distributors located in many different parts of the country) and its sample of 20 record companies for the year 1964, the Glover study estimated that a 1-cent increase in the royalty rate "would cost the public possibly $30 million per year" and that the retail price on a popular monaural LP listed at "3.89" but typically retailed at about $2.83 would increase by 20 cents.[2/] In making these estimates, the Glover study operated on the assumption "that the record companies would simply pass along the increase in fees and would not have any added costs of doing business."[3/] Moreover, the survey took into account only an increase in the rate from 2 to 3 cents per selection; the

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1/ Ibid., p. 416.

2/ House hearings, part 2. pp. 777 and 819-821.

3/ Ibid., p. 820.

optional rate of 1 cent per minute of playing time, or fraction thereof, as originally proposed in the House bill (H.R. 4347) was not considered.

In offering these estimates, the Glover report acknowledged, however, that the record producers would undoubtedly attempt to avoid a price increase of this magnitude by resorting to certain marketing options which would serve to absorb all or part of the increases in costs generated by an increase in the royalty rate. Such options would include, for example, the increased use of "public domain" music no longer subject to mechanical royalties; the reduction in the number of compositions per popular LP recording from 12 to 11, or even 10;[1/] and a reduction in the availability of recorded musical compositions exceeding 3 minutes in playing time--affecting in particular recordings of serious and classical music. In general the study on this point concluded that the "actual outcome of events would probably be various combinations of increases in price, reductions in the number of copyright offerings, and other efforts to offset the increase in copyright fees."[2/]

In the view of the music publishers, the record industry's contention that an increase in the royalty rate would result in substantially higher prices to the consumer was purely conjectural. Robert Nathan, in his testimony before the House committee observed that:[3/]

1/ Professor Glover in his testimony before the House committee (House hearings, part 2, pp. 900-901) stated that LP's account for 84 percent of all popular selections sold and 45's account for the remaining 16 percent.

2/ House hearings, part 2. p 816.

3/ House hearings, part 3. pp. 1748-1749.

> . . . history is replete with thousands of times more instances where a rising price of a unit of input was absorbed and final product prices not increased, or even decreased. If, in all our economic life, every time a rise in input price had the finished product price to be increased, we would have had such inflation as to make Brazil's inflation experience of recent years or Germany's inflation of 40 years ago look pretty mild . . . . The statement [by the record producers] that indicated that any increase in royalty payment is bound to result in an increase in the record price to the consumer I think does not stand up according to history. It is always contended, though it may or may not be true, that prices will rise. I am not . . . promising that if the price of the royalty payment went to 3 cents for all reproductions that record producers and distributors would absorb it all. One does not know for certain.

The publishers did concede that an increase in royalties may force greater selectivity in record production. Yet, in light of the findings of the Glover study that 74 percent of single records, 61 percent of popular long-playing records, and 87 percent of classical records fail to earn a profit, the publishers reasoned that there is considerable room for greater selectivity without greatly narrowing market potential.[1/]

Evaluation of House and Senate Testimony

This study has shown that the debate over the mechanical royalty issue has covered a broad spectrum of inquiry. Yet in spite of the extensive testimony heard from both the music publishers and record producers and the many issues debated, the debate can be narrowed down to two basic points of contention: (1) the economic impact of a rate increase upon the record producers, and (2) the need for a rate increase

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1/ The data were derived from a sample of 6 companies' releases, which accounted for 32 percent of the industry total during 1963. House hearings, part 2. pp. 797-799.

by the music publishers. The question which must now be answered is: Does the Congress today have in its possession enough of the information it will need, particularly on the two points just cited, to enable it to render an equitable judgment on the highly contested royalty rate question?

Concerning the first basic point of contention--the economic impact of a rate increase upon the record producers--the testimony shows that the industry was not in a sufficiently sound position financially to afford a rate increase. It based its testimony upon the findings of an independent study contracted by the Record Industry Association of America. This study, better known as the Glover report, concluded that, based on its review of the performance of the industry during the period 1955-1964, an increase in the royalty rate would not only be inequitable but would have a grave financial impact on the record industry, which during most of the period studied operated at low levels of profit--both in terms of return on net sales and on investment.[1/]

Though the Glover report may provide a reasonably good approximation of the financial performance and condition of the industry during the period 1955-1964, it fails to answer a number of important questions.

First, does the study constitute a representative sample of the financial performance of the record industry during the time period covered? In 1955 the survey covered 6 firms; in succeeding years the number of firms covered increased to 19, during the period 1960-1964. Hence, in view of this marked discrepancy in the number of firms covered during the period, is this survey representative of the performance of

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1/ See above, pages 47-52.

the industry in each of the years considered? The study does not provide enough information to warrant a firm judgment on this essential point.

In one section, the study explained that "the sample does not include literally hundreds of small companies, many of which have insufficient activity to generate profits. Inclusion of any or all of these companies would not materially change the results shown herein."[1/] However, this statement was made only in reference to 19 firms covered in the latter period of the survey--namely 1960-1964. No specific reference is made concerning the completeness of the survey for the earlier period which was based on a much smaller sample. In another section of the study it was estimated that there were at least 198 record companies actively engaged in the record business in 1963. In terms of net sales the companies were grouped in the following manner:

Less than $1 million sales	(estimate)	173 companies
$1 - $10 million sales	(estimate)	20 companies
Over $10 million sales	(actual count)	5 companies
Total		198 companies

In referring to these data in its Technical Appendix, the Glover report stated that "these figures [for 1963] are included to indicate the degree the sample companies [an apparent reference to the 19 companies covered in 1963] are representative of the industry."[2/] Apart from these two rather inconclusive observations about the composition of the survey,

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1/ House hearings, part 2. p. 800.

2/ Ibid., p. 875.

the study does not enable one to conclude that the data included provide a representative sample of industry performance from year to year during the period 1955-1964 and particularly in the earlier years of the survey when relatively few firms were covered.

A second matter of concern is the fact that the most important findings of the Glover study--namely, its evaluation of the financial record of the industry--are based on data which are not strictly comparable. As seen in the following tables, the aggregate data on sales, costs and income for 1955 were based on the reports of 6 firms, whereas in 1964 the data were based on the reports of 20 firms. Not only is the representativeness of the sample doubtful, the sample lacks continuity. The study should have been based on the performance of the same 6 firms during the period 1955-1964, or the same 19 firms for the period 1960-1964. Moreover, as noted above, if an evaluation of financial performance is to be based on either a 6- or 19-firm sample of the industry, it should be demonstrated to the satisfaction of the Congress that such a survey constituted a representative sample of the performance of the industry.

A third area of concern involves the fact that the Glover study goes into very little detail and analysis concerning the financial performance of large, medium and small firms in the industry. A breakdown by sales class (i.e., net sales: over $10 million; $1-10 million; and less than $1 million) is shown for the firms surveyed in 1963 and 1964.[1/] However, such a study based on only a two-year period is not very instructive.

1/ Ibid., pp. 810-811 and 875.

RECORD COMPANIES CONSOLIDATED INCOME STATEMENT, 1955-1964
(percentages)

	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964
Net Sales	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Less: Third Party Payments										
Contributions to Funds 1/	2.1	2.6	2.4	2.4	2.3	2.3	2.2	2.3	2.3	2.2
Artists Royalties	7.3	7.5	7.5	8.7	8.8	8.6	9.7	9.3	9.8	9.3
Copyright License Fees	8.0	9.5	9.2	9.6	9.8	9.8	9.9	10.7	11.0	11.1
Talent & Recording Expenses	10.2	9.5	8.3	9.0	9.0	8.2	8.1	8.3	8.4	9.4
Total Third Party Payments	27.7	29.0	27.5	29.7	30.0	28.9	29.9	31.0	31.5	31.9
Less: Production & Manufacturing Expenses	43.1	41.3	40.1	41.7	43.1	43.0	42.1	42.5	42.6	42.0
Gross Profit	29.2	29.7	32.4	28.6	26.9	28.2	28.0	26.5	25.9	26.1
Less: Selling, Promotion, Administrative & General Expenses	23.5	22.1	21.1	22.3	22.5	23.3	23.6	23.2	25.1	24.0
Plus: Other Income	1.9	1.2	2.6	3.0	2.4	2.3	3.1	2.3	3.3	2.4
Net Profit Before Income Tax	7.5	9.8	13.9	9.8	6.7	7.2	7.5	5.6	4.0	4.4
Income Taxes	3.9	5.2	7.1	4.9	3.9	3.7	3.8	2.5	2.4	2.7
Net Profit After Income Tax	3.6	4.6	6.8	4.4	2.8	3.4	3.8	3.1	1.6	1.7
Return on Net Worth	5.5	8.0	12.9	8.4	6.6	7.7	8.2	6.5	3.4	3.8
[Number of Reporting Companies]	[6]	[7]	[9]	[12]	[17]	[19]	[19]	[19]	[19]	[20]
Percentages of Total Industry Excise Taxes	44.8	46.8	49.9	49.5	56.2	57.8	54.0	56.3	59.0	N.A.

NOTE: Subtotals may not add to totals due to rounding.

1/ Includes payments to: American Federation of TV and Radio Artists (AFTRA), American Federation of Musicians (AF of M), and Music Performance Trust Fund (MPTF).

SOURCE: Based on data contained in tables 5 and 6 of the Appendix.

RECORD COMPANIES CONSOLIDATED INCOME STATEMENT, 1955-1964
(millions of dollars)

	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964
Net Sales	74.9	100.3	123.5	135.2	165.3	177.2	189.3	212.1	202.6	227.4
Less: Third Party Payments										
Contributions to Funds 1/	1.6	2.6	3.0	3.2	3.8	4.0	4.2	4.8	4.6	4.9
Artists Royalties	5.5	7.5	9.3	11.7	14.6	15.3	18.4	20.8	19.9	21.2
Copyright License Fees	6.0	9.5	11.3	13.0	16.3	17.4	18.8	22.6	22.2	25.2
Talent & Recording Expenses	7.6	9.5	10.3	12.2	14.9	14.5	15.3	17.5	17.1	21.3
Total Third Party Payments	20.7	29.1	33.9	40.1	49.6	51.2	56.7	65.7	63.8	72.6
Less: Production & Manufacturing Expenses	32.3	41.4	49.5	56.4	71.3	76.2	79.6	90.2	86.2	95.5
Gross Profit	21.9	29.8	40.1	38.7	44.4	49.8	53.0	56.3	52.5	59.3
Less: Selling, Promotion, Administrative & General Expenses	17.6	22.2	26.1	30.2	37.2	41.3	44.7	49.2	50.9	54.6
Plus: Other Income	1.4	1.2	3.2	4.0	3.9	4.1	5.9	4.8	6.6	5.4
Net Profit Before Income Tax	5.6	9.8	17.2	12.6	11.1	12.7	14.2	11.9	8.2	10.1
Income Taxes	2.9	5.2	8.8	6.6	6.4	6.6	7.1	5.3	4.9	6.2
Net Profit After Income Tax	2.7	4.6	8.4	6.0	4.7	6.1	7.1	6.6	3.3	3.9
Net Worth (End of Year)	49.9	57.3	65.1	71.6	71.8	78.3	87.6	100.7	97.3	104.6
[Number of Reporting Companies]	[6]	[7]	[9]	[12]	[17]	[19]	[19]	[19]	[19]	[20]
Percentages of Total Industry Excise Taxes	44.8%	46.8%	49.9%	49.5%	56.2%	57.8%	54.0%	56.3%	59.0%	N.A.

1/ Includes payments to: American Federation of TV and Radio Artists (AFTRA), American Federation of Musicians (AF of M), and Music Performance Trust Fund (MPTF).

SOURCE: Based on data contained in tables 5 and 6 of the Appendix.

Moreover, 1963 has been generally characterized as a poor year for the industry.[1/] If the Congress is to gain any real insight into the financial condition of the industry, it needs to know not only how well the industry has performed in the aggregate but how well firms of various sizes have performed over a period of five years or more.

Hence, the Glover study, as submitted to the Congress, presents an incomplete, if not sketchy picture of the financial performance of the record industry during the period 1955-1964. If the Congress is to accept the findings of the study as being a reasonably good indication of the performance of the industry during the period studied, it is incumbent upon the industry to demonstrate to the satisfaction of the Congress that its financial case was based on a thorough and representative sample of industry activity.

Finally, because almost four years have elapsed since the completion of the Glover study in July of 1965, a judgment on the mechanical royalty issue as far as the record industry is concerned can no longer be based entirely upon an analysis of industry performance during the 1955-1964 period. Since 1964 a number of important changes have occurred in the industry, of which four in particular should be noted.

1. In 1965, the Congress, with the passage of the Excise Tax Reduction Act of 1964, authorized the repeal of the 10 percent manufacturers excise

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1/ According to Standard and Poor's Industry Surveys (issue dated September 21, 1967, section 2, p. A80):

> Largely temporary factors, including inventory adjustments, limited year-to-year gain in retail sales for 1963. The excess supply in 1963 led to price cutting, further penalizing dollar sales.

tax on phonograph records--effective June 22, 1965. In fiscal 1965, actual collections of excises on records amounted to $26.7 million.[1/] Though the law did not specifically state that the tax savings should be passed on to the consumer, a review of the legislative history of the measure and the statements issued by the President and the Treasury Department on this matter clearly shows that this was the desired objective of the excise tax repeal. Given this background, the House Committee on the Judiciary, in its final report to the Congress on copyright revision, in March of 1967, noted that 9 cents of the 18-cent excise tax on a $3.98 list-price record had been passed on to the distributor--meaning therefore that the manufacturer's price to the distributor for popular long-playing records had been raised by 9 cents in this instance. [This statement was based upon a report by the President's Council of Economic Advisers on September 22, 1965, which stated that: "Manufacturers' prices of phonograph records net of tax were raised by about half the amount of the tax reduction, limiting the possible pass-through to consumers."] The Committee report went on to observe that:[2/]

> . . . Federal excise taxes for 1964 were more than $25 million; if unit sales remained the same and manufacturers kept half the tax, their net sales figures would increase by at least $12.5 million. In addition: (1) elimination of the tax also eliminated the substantial costs of paperwork connected

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1/ U.S. Congress. Joint Committee on Internal Revenue Taxation. Federal excise tax data. Prepared by Staff of the Joint Committee on Interral Revenue Taxation. May 1967. [U.S. Govt. Print. Off., Washington, D.C.] p. 10.

2/ U.S. Congress. House. Committee on the Judiciary. Copyright law revision; report to accompany H.R. 2512. Op. Cit., p. 73.

with it; (2) record marketers also have generally taken advantage of some of the tax deduction rather than passing it on to consumers, since discount prices have changed relatively little; and (3) unit sales increased substantially in 1965.

Subsequently, in testimony presented before the Senate Subcommittee on Patents, Trademarks and Copyrights, record industry spokesmen contended, on the other hand, that "an overwhelming number of manufacturers have made downward adjustments in their prices following the excise tax repeal."[1/] To support its contention, the industry submitted for the record a collection of news reports from music trade publications (Cash Box and Billboard)[2/] which cited decreases in prices for LP's and singles following the excise tax repeal.[3/] Industry spokesmen, however, did not present any statistical information which would provide a clear indication of the overall effect of the excise tax repeal on the manufacturer's selling price of LP's and singles to the distributor.

According to data compiled by the Bureau of Labor Statistics of the U.S. Department of Labor, wholesale prices of monaural, stereo and singles (45 rpm)--as seen in the table below--all exhibited an increase instead of a decrease immediately following the tax repeal. However, following these increases, it is seen that downward adjustments were made in wholesale prices of mono and stereo records in October 1965. These adjustments, however, did not cancel all of the June-July 1965 increase. Prices

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1/ Senate hearings (1967), part 2. p. 470.

2/ Ibid., pp. 470-479.

3/ These news reports covered price developments during the period July 3-10, 1965.

thereafter remained unchanged throughout the remainder of the year and the whole of 1966. The 5.6 percent price increase (June-July 1965) of singles, on the other hand, was virtually wiped out by a 5.2 percent reduction made in March of 1966. Thereafter prices remained unchanged through the balance of 1966.

Index of Wholesale Prices of Phonograph Records
May-December 1965
(1957-59 = 100)

1965	LP's Mono	LP's Stereo	Singles (45 rpm)
May	107.5	102.7	106.2
June	107.5	102.7	106.2
July	113.3	109.0	112.2
Aug.	113.3	109.0	112.2
Sept.	113.3	109.0	112.2
Oct.	110.2	106.9	112.2
Nov.	110.2	106.9	112.2
Dec.	110.2	106.9	112.2
	(Percentage Change)		
June-July	5.4	6.1	5.6 1/
July-Oct.	-2.7	-1.9	—
June-Oct.	2.5	4.1	—

1/ The June-July 1965 increase was virtually wiped out by a decrease in the index to 106.4 in March of 1966.

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics

2. As reported in Billboard, the record industry in 1966 achieved a "breakthrough in the tape cartridge field, with the nation's three major automobile manufacturers promoting tape units in new cars."[1/] According to recent estimates made by the research department of Billboard Publications, tape sales (including 4-track and 8-track cartridges or cassetts) have gained considerable momentum in recent years, increasing from a relatively insignificant amount in the middle 1960's to a rough estimate of about $250 million in 1968.[2/] This would be in addition to Billboard's estimate of $1.1 billion in record sales for 1968.

3. In 1967, the record industry made the decision to raise monaural prices to stereo levels as "a major step in the creation of an all-stereo industry."[1/] Prior to this action, the most commonly cited suggested retail list price on popular LP's was $3.79 for mono and $4.79 for stereo

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1/ Billboard, "1968-69 International buyer's guide . . . ." Op. cit., p. 12.

2/ Concerning the market potential of tape sales, Billboard in a recent editorial (April 19, 1969, p. 19) made the following observation:

> To those who have been deeply involved with pre-recorded music on tape, 1968's estimated tape sales of $247 million is quite a pat on the back. But before these industry leaders bask in their glory, they must consider one major fact.
>
> The full potential of tape is far from being approached. While demand for CARtridges in automobiles has recently outpaced the supply, the home and portable markets for pre-recorded tape, for the most part, remain as virgin territories.
>
> What this means, in effect, is that there is a job to be done--a consumer education and awareness job. For, if tape will be limited to the car, it will not continue to register the dynamic growth that it had in 1967 and 1968.

recordings. Hence, in this instance the list price of mono LP's was raised by $1.00. As far as new releases were concerned, the conversion to all stereo production, according to music industry sources, was completed by the end of the second half of 1968. Currently the most commonly suggested list price for popular LP's is $4.79. It should be noted, however, that these price citations are somewhat overstated because of widespread discounting at the retail level.

According to the tabulation shown below, the wholesale price index of all phonograph records over the period 1964-1968 increased by 12.4 percent, compared to increases of 8.2 percent for the all commodity average and 4.0 percent for consumer finished durable goods. A further

Wholesale Prices of Phonograph Records and Commodities in General, 1964-1968
(1957-59 = 100)

Year	All Commodities	Consumer Finished Durable Goods	Phonograph Records			
			Total	Mono (33 1/3)	Stereo (33 1/3)	Singles (45 rpm)
1964	100.5	99.9	103.4	107.4	102.6	106.2
1965	102.5	99.6	105.9	109.6	105.3	109.2
1966	105.9	100.2	106.0	110.2	106.9	107.3
1967	106.1	101.7	111.2	121.9	107.3	108.9
1968	108.7	103.9	116.1	134.0	107.2	108.9
			Percentage Change			
1964-1968	8.2	4.0	12.3	24.8	4.5	2.5
1966-1968	2.6	3.7	9.5	21.6	0.3	1.5

SOURCE: U.S. Department of Labor, Bureau of Labor Statistics.

breakdown of the price data for phonograph records shows, however, that the bulk of the rise was attributable to a 24.8 percent rise in mono prices. The bulk of this rise came during 1966-1968, with mono prices increasing by 21.6 percent. Stereo and singles prices, on the other hand, exhibited relatively modest increases during that period. These data, therefore, would tend to confirm the price effect of the industry's recent conversion to all stereo production, as far as new releases are concerned.

Moreover, it should be noted that when the decision was made to make this conversion in 1967, monaural LP sales, as seen in the table below, accounted for 41.0 percent of total LP sales (including sales

Stereo vs. Monaural LP Sales, 1961-1967
(All figures are percentages)

		1961	1962	1963	1964	1965	1966	1967
TOTAL LP SALES	Stereo Dollars	29.7	30.6	34.1	35.7	39.4	44.7	59.0
	Mono Dollars	70.3	69.4	65.9	64.3	60.6	55.3	41.0
	Stereo Units	25.6	25.7	28.8	30.1	33.3	38.6	54.1
	Mono Units	74.4	74.3	71.2	69.9	66.7	61.4	45.9
POPULAR LP SALES	Stereo Dollars	28.9	29.3	32.7	34.1	37.4	43.5	58.1
	Mono Dollars	71.1	70.7	67.3	65.9	62.6	56.5	41.9
	Stereo Units	24.8	24.7	27.8	28.9	32.0	37.4	53.2
	Mono Units	75.2	75.3	72.2	71.1	68.0	62.6	46.8
CLASSICAL LP SALES	Stereo Dollars	37.6	40.4	44.0	47.8	55.8	57.0	70.1
	Mono Dollars	62.4	59.6	56.0	52.2	44.2	43.0	29.9
	Stereo Units	35.4	35.7	40.1	43.5	49.4	55.4	69.6
	Mono Units	64.6	64.3	59.9	56.5	50.6	44.6	30.4

NOTE: Sales through non-racked retail outlets only.

SOURCE: Billboard, "1968-69 International buyer's guide of the music-record industry" (Cincinnati, Ohio) v. 80, no. 35, August 31, 1968: 13.

through non-rack retail outlets only) in 1967--down from 55.3 percent in 1966. Hence, from this it is seen that the conversion and the price increase in monaural LP's, beginning with 1967, did affect a sizable though declining portion of the industry output and sales.[1/]

4. Finally, it should be noted that record sales since 1963 have risen sharply, in comparison to the period 1959-1963. In this earlier period, total sales as estimated by Billboard (see Table 1 of the Appendix) increased by $95 million, representing an average annual increase (compounded) of 3.75 percent. In contrast, sales for the period 1963-1967 increased sharply by $353 million, or an annual increase of about 11.0 percent. Preliminary estimates by Billboard for 1968 show that the sales rise continued, but by a much lower annual rate--4.7 percent--than that recorded for 1963-1967. However, overall, the volume of record sales since 1963 when compared to the 1959-1963 period has been impressive.

Therefore, because the record industry has experienced a number of important changes since 1964--including, in particular, the effects of the excise tax repeal, the introduction and rapid growth in sales of the tape cartridge, the virtually complete conversion to higher priced stereo recordings in the case of new releases, and an impressive rise in total record sales--it stands to reason that the Congress, in the course of making its final decision on the mechanical royalty rate question, should be fully informed as to how these various developments have affected industry cost and profit margins since 1964.

1/ In this connection, it should be noted that the Glover study based its analysis primarily upon the pricing structure of the long playing monaural record.

Concerning the second basic point of contention, the need for a rate increase by the music publishers, the music publishers maintained throughout both the House and Senate hearings that they would much prefer that Congress eliminate entirely from the Copyright law the compulsory licensing requirement and the statutory rate ceiling, and that mechanical reproduction rights to copyright musical compositions and the rates of compensation to be charged by the copyright owner should be governed by free market forces and not by statutory rate fixing. However, if the Congress should decide to retain the principle of compulsory licensing, then the music publishers took the position "that in simple justice the statutory rate must be raised, not a little, but realistically."[1/] In justifying the need for an increase in the statutory rate, the publishers argued that financial need was not a relevant issue; that the current statutory ceiling rate severely limits the range of bargaining and should be raised, thereby enabling market forces to play a more meaningful role in the determination of mechanical royalty arrangements.[2/]

In spite of this contention on the part of the music publishers, there is no escaping the fact that the central issue in the mechanical royalty rate controversy is the question of adequacy of the royalty rate. If the Congress should decide to expand the range of bargaining as urged by the music publishers, it will in effect be sanctioning a change which will have a direct bearing on the finances of both the record producers and

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1/ Senate hearings (1967), part 2. p. 375.

2/ See above, page 63.

the music publishers. In the eyes of the record producers, such a development would involve increased costs; to the music publishers such a step would mean increased revenue. Given these conflicting objectives and the fact that the Congress is currently placed in the position of being the arbiter in this dispute over the royalty rate, it stands to reason that the Congress should be given access to the type of financial information which will enable it to gain an approximate understanding of the relative financial position of the music publishers and the record producers before it renders a final judgment on the mechanical royalty rate question.[1/]

As already noted, the record producers did present considerable financial information covering the period 1955-1964. It has been demonstrated that these data, however, suffer from numerous shortcomings and thereby are not completely instructive for the period covered. On the other hand, the music publishers to date as a body have refrained from furnishing the Congress any meaningful economic data on their activities.

In an effort to obtain for the record certain types of financial information from the music publishers, the chairman of the Senate committee, Senator John L. McClellan, on April 27, 1967, sent a questionnaire to the presidents of seventy music publishing companies. In an

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1/ It must also be recognized that the changes in the structure of the music-recording business in recent years, particularly the mergers and other forms of interweaving that have taken place between publishers and record producers, as described in Part I of this study (see pages 24-29), seriously complicate the decision the Congress is called upon to make; such changes make even more important accurate financial and structural information about the various enterprises involved. See also pages 98-101 below.

accompanying letter, Senator McClellan stated the following reasons why the committee was requesting such information.[1/]

> . . . The representatives of the music publishing industry in their testimony before the Subcommittee have advocated an increase in the royalty rate to at least 3 cents per composition.
>
> In order to adequately consider this matter, the Subcommittee will require certain economic data, as enumerated in the attached questionnaire. While I appreciate that the compilation of this information will require some effort, I trust that the Subcommittee will receive your cooperation in assisting it to reach a fair and informed judgment concerning the mechanical royalty rate.

The full text of the questionnaire is cited below:

A. Name of company.
B. If subsidiary or division of another company, give name of parent firm and relationship.
C. Date entered the music publishing business.
D. Describe your functions as a music publisher.
E. Furnish detailed profit and loss statement for each of the years, 1960-1964.
F. If not indicated on profit and loss statement, show for each year, 1960-1964:
    1. Total mechanical royalties received.
    2. Breakdown of costs (identification and valuation) incurred in publishing music for recording.
    3. Profits from music publishing sector of business.
    4. After tax profits from music publishing sector of business as a percent of invested capital.
G. For each year, 1960-1964, state:
    1. Total cost of publishing compositions.
    2. Number of compositions published.
    3. Average investment per composition (1. divided by 2.).
    4. Average profit (or loss) per composition.
    5. Average ratio, 1960-1964, of income from mechanical royalties to total income from compositions.

1/ Senate hearings (1967), part 4, pp. 1098-1099.

6. Average return per composition from mechanical royalties necessary to break even (3. multiplied by 5.).

7. Average number of recordings necessary to break even (6. divided by one cent, the mechanical royalty per recording to the publisher (assuming payment of the statutory rate and no collection cost)).

8. Average number of recordings necessary to break even under the proposed mechanical royalty increase to 2 1/2¢ (6. divided by 1 1/4 cents).

In general the response to the questionnaire was poor. Of the 70 companies contacted, only 15 made a response of any kind. Of this total, 8 companies responded in varying degrees of detail, while the remaining 7 firms expressed various reasons why it would not be possible for them to furnish the type of information requested by the committee. Though the committee was able to gain some insight into the financial condition of certain publishing firms, the overall scope of the response to the committee's inquiry was too limited to enable it to gain any useful insights into the financial performance of the music publishing business as a whole, as well as into the performance of a good cross section of individual firms, during the period 1960-1964--the period covered by the inquiry.

The debate over whether or not the statutory rate acts as a ceiling or as a fixed rate with the exception of certain stereotyped variations is instructive but cannot be considered a determining factor in the royalty rate dispute.[1/]

1/ See above, pages 63-73.

In support of their argument against an increase in the statutory maximum, the record industry, based on the Glover report's survey of mechanical license fees charged two major record companies during randomly selected months in 1964 and 1965, contended that almost three-fourths of the licenses call for a rate of 2 cents per selection sold and that the balance were at rates at less than the statutory 2-cent rate. These variations, however, were characterized as standardized (or stereotyped) rates, with "practically no negotiation of fees in individual cases."[1/] Given these findings, the industry thereby concluded that Congressional approval of a higher statutory rate would not act simply as the ceiling but "would in fact become the prevailing standard fee, accompanied with standard differentials for stereotyped variations from standard circumstances in exactly the same way the present 2-cent statutory fee has become the almost invariable standard for establishing license fees."[2/]

The music publishers on the other hand contended that their studies (conducted during 1965 and 1966) show that (1) considerable individual bargaining does exist between the publisher and the record producer concerning the payment of mechanical royalties, and (2) that two-thirds of all royalty payments and about one-half of the dollar amounts actually involved rates of less than the 2-cent maximum. Hence, in the view of spokesmen for the publishers, "standarization at the 2-cent ceiling," as contended by the record producers, "is a myth."[3/]

1/ House hearings, part 2. p. 831.

2/ Ibid., p. 833.

3/ Senate hearings (1967), part 2. p. 412.

Despite these conflicting intrepretations, the debate over the ceiling rate question does indicate that rate variations--whether they be stereotypes or the result of individual negotiation--do exist below the statutory maximum and do affect a sizable portion of the copyrighted selections being recorded. Whether or not, as the record industry contends, an increase in the statutory rate would simply involve an automatic and proportional increase in existing mechanical royalty fees is a highly conjectural point of contention. More important, this is a matter which is beyond the jurisdiction and control of Congress. It must be emphasized that the Congress is not being asked to establish a fixed schedule of royalty rates. It is being asked to make a determination as to whether or not the present range of bargaining between the music publisher (or copyright owner) and the record producer should be broadened. In the event that the Congress should decide to increase the rate ceiling, the new statutory rate, as recommended by the Copyright Office:[1/]

> . . . should be at the high end of a range within which the parties can negotiate, now and in the future, for actual payment of a rate that reflects market values at that time. It should not be so high, however, as to make it economically impractical for record producers to invoke the compulsory license if negotiations fail.

Hence, as far as the Congress is concerned, the actual rates charged following an increase in the statutory rate would depend upon prevailing market conditions and the relative bargaining strengths of the parties

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1/ U.S. Copyright Office. Copyright law revision, part 6. Supplementary report of the Register of Copyrights on the general revision of the U.S. Copyright law: 1965 revision bill. Op. cit., p. 58

involved, keeping in mind, however, that the copyright owner cannot bargain for a rate higher than the ceiling established by law.[1/]

This line of reasoning applies as well to the consumer argument advanced by the record industry in defense of its position on the royalty rate question.[2/] It will be recalled that on the basis of the evaluation made by the Glover report, the industry contended that due to its poor profit position, the increase in the mechanical royalty rate would have to be passed on to the distributor and ultimately to the consumer. In its view, the effect would most likely be a combination of increased retail prices, fewer compositions per LP recording, a reduction in the number of recordings made of musical compositions running over three minutes of playing time, and the increased use of public domain music. Here again the impact of a change in the statutory rate on the consumer and the music-recording business will depend largely upon prevailing market forces. The Congress exercises no control over the makeup and quality of the product or actual prices to be charged the consumer. Again, its primary function is to determine whether or not the music publisher (or copyright owner) should be given the opportunity to

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1/ It should be remembered that the record producer, under existing copyright law, has two options: (1) He may enter into direct negotiations with the owner of a copyrighted musical work in agreeing to the royalty rate to be charged; or (2) he may invoke his privileges under the compulsory licensing provisions of the law by simply notifying the owner of his intent to mechanically reproduce said work and pay the statutory fee for each recording produced--provided that the copyright owner has allowed for the previous mechanical reproduction of said work.

2/ See above, pages 73-75.

bargain for higher compensation from the record producer, or from any other party wishing to reproduce a copyrighted musical work by mechanical means.

Concluding Observations

This review and evaluation of House and Senate testimony on the mechanical royalty rate issue has shown, among other things, that:

1. The record industry--which opposes any increase in the current mechanical royalty rate ceiling--has not provided the Congress a complete and meaningful picture of its financial condition. 1/

2. Similarly, the music publishers and the composers they represent--who advocate an increase in the ceiling rate--have demonstrated a clear reluctance to provide the Congress with the type of financial information that will be needed to evaluate their position. 2/

Thus, since of course any decision on the part of the Congress on the mechanical royalty rate issue will have a direct bearing on the finances of both the record producers and the music publishers, it should be abundantly clear that the Congress, in fairness to both sides, must be furnished a thorough and up-to-date accounting of the financial condition of the record producers and the music publishers.

It should be understood that neither the House nor the Senate committees having jurisdiction over this issue established any preconditions concerning the type of information that should be presented to Congress. All parties involved in the debate were given ample opportunity to present their respective cases to the Congress. Nevertheless, though the Congress has gained some useful insights into the controversy, it has not yet been

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1/ See above, pages 76-88.

2/ See pages 89-92.

provided the type of economic information which it will need to render a fair and equitable judgment on this highly controversial issue.

Hence, if Congress is unable to successfully arbitrate the dispute based on the information presented to date, it will have to resort to additional factfinding. The type of factfinding would have to be determined by the appropriate Congressional committees themselves. However, the Congress is afforded a number of options, including, for example, further study and investigation by committee staff--including, if necessary, outside (independent) research assistance; the establishment of an independent ad hoc study group by the Congress; and/or the reopening of hearings by one or both of the committees having jurisdiction over this question.

Regardless of the type of independent factfinding resorted to, Congress can be expected to want to delve more deeply into the following areas of inquiry before it decides whether or not the mechanical royalty rate ceiling should be changed.

First, top priority needs to be given to obtaining all financial information considered pertinent to the royalty rate question. It is realized that obtaining such information will be complicated by the considerable overlay or interwovenship that characterizes much of the economic activity in the music-recording business today. A further complicating factor is the frequency with which firms enter and leave the business, in both music publishing and record production and distribution. Despite these complications the division of opinion between the music publishers and record producers thus far remains clear-cut; hence

the Congress needs to gain a much clearer understanding of the relative financial conditions of the principals involved in the mechanical royalty debate.

Considerable study will have to be made of the financial characteristics of the music-recording business before any firm decision can be made concerning the type of financial information (and other related economic data) that the Congress will need in making its final determination. The following guidelines concerning the availability and scope of such data can be suggested.

1. The Congress should require disclosure of the financial records of all music publishing and recording firms which will be directly affected by proposed changes in the mechanical royalty rate ceiling. This includes not only independent firms but divisions and subsidiaries of multi-market companies as well.

2. Because both segments of the music business (publishing and recording) encompass many hundreds of enterprises, it must be assumed that any financial survey will have to be conducted on a sample basis. Nonetheless, it is essential that it be demonstrated to the satisfaction of the Congress that such a sample is, within reason, representative of firm activity--large, medium and small (based on appropriate sales ranges), in both segments of the industry.

3. The time period to be covered in such a survey should be long enough to take into account the extensive changes that have taken place in the structure and economic performance of

the music-recording business--with particular attention being given to changes that have taken place since the middle 1950's. Moreover, it is essential that a breakdown according to firm size be shown for each year covered by the financial survey.

Second, factfinding should take into account the many important changes that have taken place in the economic structure of the music-publishing and recording businesses since the end of World War II and particularly since the middle 1950's. As noted in Part I of this study, both music publishing and recording segments of the business have experienced considerable deconcentration over the past two decades as the result of the entry of hundreds of new firms.[1/] However, despite this trend, it is becoming increasingly difficult to make a clear distinction concerning the business activities of music publishers and record producers in the music-recording business. As has already been demonstrated, the important functions involving the composition, publishing, recording, distribution and promotion of musical works have become highly interrelated, and currently there are no indications of an abatement in this trend.[2/] Thus, particular attention should be given to the economic implications of:

(1) the growing number of music-recording organizations which assume the role of both the music publisher and the record producer--including enterprises formed by composers and recording artists and new recording companies;

(2) large scale and integrated entertainment companies--including in particular the major motion picture

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1/ See above, pages 12-24.

2/ See pages 24-29.

companies and broadcasting organizations--which have become extensively involved in both music publishing and the production distribution of sound recordings; and

(3) the growing importance of conglomerates or multi-market enterprises in both the publishing and recording fields of the music-recording business--a fairly recent development.

During the course of the Senate and House hearings, occasional reference was made concerning patterns of interwovenship in the music-recording business; however, the testimony presented before both committees provides very little insight concerning the economic implications of this postwar development. Thus, Congress should make every effort to find out how these market changes have affected the economic structure of the business, and, in particular the relative bargaining strengths of the music publisher and the record producer who are concerned with the amount of royalty to be paid the publisher and composer for the mechanical reproduction of a copyrighted musical composition.

In making these observations, it is realized that the current impasse between the music publishers and the record producers over the mechanical royalty rate issue is one which cannot be easily resolved by the Congress. During the course of the Senate committee's hearings on this question, Senator John McClellan placed the issue in clear focus when he said: 1/

> I am sure it is the purpose of the committee to undertake and labor faithfully to find an equitable solution to these problems, but it is not going to be easy. We will need a lot of information, and then a lot of wisdom to top that.

1/ Senate hearings, part 4. p. 1099.

This study has attempted to evaluate whether or not the Congress has the information it needs to render a final judgment on the mechanical royalty controversy. Unfortunately, it must be said that the findings to date remain inconclusive.

APPENDIX

List of Tables

Table 1.

U. S. RECORD SALES, 1921-1968
(millions of dollars)

Year	As reported by Billboard 1/		As reported by Record Industry Association of America (RIAA)			
	Retail Sales	Yearly Percent Change	Manufacturers Sales	Yearly Percent Change	Retail Sales	Yearly Percent Change
	$	%	$	%	$	%
1921	106	—	48	—	106	—
1922	92	- 13.2	42	- 12.5	92	- 13.2
1923	79	- 14.1	36	- 14.3	79	- 14.1
1924	68	- 13.9	31	- 13.9	68	- 13.9
1925	59	- 13.2	27	- 13.0	59	- 13.2
1926	70	18.6	32	18.5	70	18.6
1927	70	0.0	32	0.0	70	0.0
1928	73	4.3	33	3.1	73	4.3
1929	75	2.7	34	3.0	75	2.7
1930	46	- 38.7	21	- 38.2	46	- 38.7
1931	18	- 60.9	8	- 61.9	18	- 60.8
1932	11	- 38.9	5	- 37.5	11	- 38.9
1933	6	- 45.5	2	- 60.0	6	- 45.5
1934	7	16.7	3	50.0	7	16.7
1935	9	28.6	4	33.3	9	28.6
1936	11	22.2	5	25.0	11	22.2
1937	13	18.2	6	20.0	13	18.2
1938	26	100.0	12	100.0	26	100.0
1939	44	69.2	20	66.7	44	69.2
1940	48	9.0	22	10.0	48	9.0
1941	51	6.2	23	4.5	51	6.2
1942	55	7.8	25	8.7	55	7.8
1943	66	20.0	30	20.0	66	20.0
1944	66	0.0	30	0.0	66	0.0

(Continued on next page)

NOTE: Billboard and RIAA data on retail sales are identical for the period 1921-1944.

1/ Includes data compiled by Record Industry Association of America and estimates from other sources.

Table 1. (Continued)

U. S. RECORD SALES, 1921-1968
(millions of dollars)

Year	As reported by Billboard 1/		As reported by Record Industry Association of America (RIAA)			
	Retail Sales $	Yearly Percent Change %	Manufacturers Sales $	Yearly Percent Change %	Retail Sales $	Yearly Percent Change %
1945	109	65.1	45	50.0	99	50.0
1946	218	100.0	90	100.0	198	100.0
1947	224	2.8	97	7.8	204	3.0
1948	189	- 15.6	82	5.2	172	- 15.7
1949	173	- 8.5	75	- 18.5	157	8.7
1950	189	9.2	82	9.3	172	9.5
1951	199	5.3	85	3.6	178	3.5
1952	214	7.5	90	5.9	189	6.2
1953	219	2.3	91	1.1	191	1.0
1954	213	- 2.7	87	- 4.4	183	- 4.2
1955	277	30.0	112	28.7	235	28.4
1956	377	36.1	155	38.4	313	33.2
1957	460	22.0	180	16.1	378	20.8
1958	511	11.1	198	10.0	415	9.8
1959	603	18.0	230	16.2	484	16.6
1960	600	- 0.5	228	0.9	480	- 0.8
1961	640	6.7	244	7.0	513	6.9
1962	687	7.3	273	11.9	572	11.5
1963	698	1.6	252	- 7.7	530	- 7.3
1964	758	8.6	275	9.1	579	9.2
1965	862	13.7	300	9.1	630	8.8
1966	959	11.2	330	10.0	700	11.1
1967	1,051	9.6	370	12.1	780	11.4
1968	1,100	4.7	N.A.	—	N.A.	—

NOTE: Billboard and RIAA data on retail sales are identical for the period 1921-1944.

1/ Includes data compiled by Record Industry Association of America and estimates from other sources.

Table 2.

HOT 100 PUBLISHERS
(Based on relative positions and number of weeks on weekly Hot 100 Chart from January 6, 1968 to October 26, 1968)

Publisher - Licensee Name	1968 Position	1965 Position 1/	No. of Records
Jobete, BMI	(1)	(1)	45
Screen Gems - Columbia, BMI	(2)	(2)	29
Viva, BMI	(3)	(--)	6
East, BMI	(4)	(49)	20
MacLen, BMI	(5)	(5)	7
Press, BMI	(6)	(--)	6
Unart, BMI	(7)	(7)	7
Cotillion, BMI	(8)	(18)	8
Russell - Cason, ASCAP	(9)	(--)	6
Peer Internationa, BMI	(10)	(--)	7
Slacsar, BMI	(11)	(--)	3
Acuff - Rose, BMI	(12)	(8)	9
Nipper, ASCAP	(13)	(--)	5
Kaskat, BMI	(14)	(--)	7
Croma, ASCAP	(15)	(--)	4
Charing Cross, BMI	(16)	(--)	2
Blackwood, BMI	(17)	(16)	6
Tree, BMI	(18)	(4)	7
14th Hour, BMI	(19)	(--)	6
Blue Seas, ASCAP	(20)	(92)	7
Jac, ASCAP	(20)	(94)	7
Razor Sharp, BMI	(22)	(--)	4
Francis, Day & Hunter, ASCAP	(23)	(--)	3
Lowery, BMI	(24)	(43)	3
Redwal, BMI	(25)	(--)	8

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1/ (--) Indicates that company did not fall within the rankings of the Hot 100 Publishers in 1965.

Table 2. (Continued)

HOT 100 PUBLISHERS
(Based on relative positions and number of weeks on weekly Hot 100 Chart from January 6, 1968 to October 26, 1968)

Publisher - Licensee Name	1968 Position	1965 Position 1/	No. of Records
Duchess, BMI	(26)	(19)	5
T. M., BMI	(27)	(22)	4
Dratleaf, BMI	(28)	(--)	2
Fame, BMI	(29)	(--)	4
James, BMI	(30)	(--)	3
Gideon, BMI	(31)	(--)	4
Camad, BMI	(32)	(57)	4
Patricia, BMI	(33)	(--)	3
Kama Sutra, BMI	(34)	(--)	4
Nickel Shoe, BMI	(35)	(--)	3
Irving, BMI	(36)	(--)	5
Tuna Fish, BMI	(37)	(--)	2
Chevis, BMI	(38)	(14)	7
Dwarf, ASCAP	(39)	(--)	4
Sea of Tunes, BMI	(40)	(20)	3
Northern, ASCAP	(41)	(--)	4
Rivers, BMI	(42)	(--)	7
Essex, ASCAP	(43)	(--)	3
James Boys, BMI	(44)	(--)	6
Gallico, BMI	(45)	(25)	6
Dandelion, BMI	(46)	(75)	7
Double Diamond, BMI	(47)	(--)	9
Su-Ma, BMI	(48)	(--)	2
Downstairs, BMI	(49)	(--)	8
Chisa, BMI	(50)	(--)	1

(Continued on next page)

1/ (--) Indicates that company did not fall within the rankings of the Hot 100 Publishers in 1965.

Table 2. (Continued)

HOT 100 PUBLISHERS
(Based on relative positions and number of weeks on weekly Hot 100 Chart from January 6, 1968 to October 26, 1968)

Publisher - Licensee Name	1968 Position	1965 Position 1/	No. of Records
Daly City, BMI	(51)	(--)	3
Boom, BMI	(52)	(--)	3
Colgems, ASCAP	(53)	(65)	2
Glaser, BMI	(54)	(--)	2
Brent, BMI	(55)	(--)	2
Feist, ASCAP	(56)	(38)	3
Takya, ASCAP	(57)	(--)	2
Casserole, BMI	(58)	(--)	2
New Keys, BMI	(59)	(--)	3
Pocket Full of Tunes, BMI	(60)	(--)	3
Pronto, BMI	(61)	(--)	6
Nemperor, BMI	(62)	(--)	3
Time, BMI	(63)	(87)	7
Golo, BMI	(64)	(--)	2
Canopy, ASCAP	(65)	(--)	1
Conrad, BMI	(66)	(--)	2
Four Star, BMI	(67)	(71)	5
Mainstay, BMI	(68)	(41)	1
Sea Chest, BMI	(69)	(--)	1
Arc, BMI	(70)	(17)	2
Deep Fork, ASCAP	(71)	(--)	1
Kilyn, BMI	(72)	(--)	1
Wemar, BMI	(73)	(--)	1
Taccoa, BMI	(74)	(--)	3
Comet, ASCAP	(75)	(--)	1

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1/ (--) Indicates that company did not fall within the rankings of the Hot 100 Publishers in 1965.

Table 2. (Continued)

HOT 100 PUBLISHERS
(Based on relative positions and number of weeks on weekly Hot 100 Chart from January 6, 1968 to October 26, 1968)

Publisher - Licensee Name	1968 Position	1965 Position 1/	No. of Records
Miller, ASCAP	(76)	(12)	2
Hollis, BMI	(77)	(--)	1
Jalynne, BMI	(78)	(--)	4
Blackhawk, BMI	(79)	(--)	1
Faithful Virtue, BMI	(80)	(76)	2
Helios, BMI	(81)	(--)	2
Post, ASCAP	(82)	(--)	1
Nice Songs, BMI	(83)	(--)	2
Sea Lark, BMI	(84)	(21)	5
Vector, BMI	(85)	(--)	2
North State, ASCAP	(86)	(--)	1
Donna, ASCAP	(87)	(--)	1
Crazy Cajun, BMI	(88)	(--)	4
Words & Music, ASCAP	(89)	(--)	1
Southern, ASCAP	(90)	(24)	2
Akbestal, BMI	(91)	(--)	5
Orellia, BMI	(92)	(--)	1
Slamina, BMI	(93)	(--)	3
Chambro, BMI	(94)	(--)	1
Blue Crest, BMI	(95)	(--)	1
Milene, ASCAP	(96)	(--)	2
New Colony, BMI	(97)	(--)	2
Hazlewood, ASCAP	(98)	(--)	4
Veytig, BMI	(99)	(--)	1
Irwin, ASCAP	(100)	(--)	1

1/ (--) Indicates that company did not fall within the rankings of the Hot 100 Publishers in 1965.

SOURCE: Billboard.

Table 3.

ESTIMATES OF TOTAL MECHANICAL ROYALTIES COLLECTIONS
1959-1968

Year	Total Mechanical Collections Represented by Harry Fox Agency (1)	Estimated Harry Fox Agency % of Industry 1/ (2)	Estimated 100% of Industry Mechanical Collections (Col. 1 ÷ Col. 2) 1/ (3)
1959	$ 13,099,520	61.5	$ 21,300,030
1960	14,380,845	63	22,826,730
1961	14,713,804	64.5	22,812,090
1962	17,598,689	66	26,664,680
1963	17,849,130	67.5	26,443,150
1964	19,849,452	69	28,767,320
1965	23,459,945	70.5	33,276,510
1966	27,584,608	72	38,311,950
1967	30,834,321	73.5	41,951,450
1968	33,577,935	75	44,770,580

1/ According to Prager and Fenton (in letter sent to Leonard Feist, Executive Vice President, National Music Publishers' Association, dated February 11, 1969):

> . . . These estimated percentages are based upon 60% in 1958 to 75% in 1968, and assume an annual ratable change in the intervening years.
>
> Derived total mechanical royalty collections appear to bear a consistent percentage of dollar record sales at retail as reported by the R.I.A.A. and printed in Billboard. This comparison seems to support the reliability of the derived totals. Variations can be attributed to a variety of factors, including the estimated percentages utilized and the assumption that the annual change was ratable throughout the period.

SOURCES: Harry Fox Agency and Prager and Fenton, Certified Public Accountants (New York, N.Y.).

Table 4.

TOTAL ANNUAL COLLECTIONS OF PERFORMANCE ROYALTIES
BY ASCAP AND BMI
1958-1968

Year	Total Performance Royalties
1958	$38,998,000
1959	41,059,000
1960	44,459,000
1961	45,656,000
1962	48,552,000
1963	52,180,000
1964	54,428,000
1965	59,144,000
1966	65,522,000
1967	69,381,000
1968	72,399,000

SOURCE: National Music Publishers' Association

Table 5.

FINANCIAL REPORTING FORMS
MANUFACTURE AND SALES OF PHONOGRAPH RECORDS
SUMMARY REPORT
(thousands of dollars)

	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964
Gross Sales	84,643	115,682	143,205	166,759	205,788	220,620	235,439	270,950	264,075	297,282
Less: Federal Excise Taxes	5,011	7,254	8,993	9,792	12,901	13,197	13,185	15,311	14,894	17,472
Returns, Exchanges, Allowances, Cash Discounts Bad Debts, and State Excise Taxes (If Any)	4,759	8,090	10,702	21,761	27,588	30,172	32,963	43,531	46,612	52,422
Net Sales	74,873	100,338	123,510	135,206	165,299	177,251	189,291	212,108	202,569	227,388
Less: Cost of Goods Sold (From C of G Report Form)	52,971	70,548	83,428	96,469	120,889	127,432	136,238	155,846	150,072	168,073
Gross Profit	21,902	29,790	40,082	38,737	44,410	49,819	53,053	56,262	52,497	59,315
Less: Selling, Advertising and Promotional Expenses	10,205	11,500	14,070	16,063	19,443	21,651	22,906	25,869	25,866	30,015
General and Administrative Expenses	7,444	9,718	11,999	14,096	17,774	19,613	21,749	23,305	25,011	24,588
Total Operating Expenses	17,649	21,218	26,069	30,159	37,217	41,264	44,655	49,174	50,877	54,603
Other Income	1,388	1,223	3,158	4,043	3,902	4,072	5,892	4,829	6,612	5,405
Net Operating Profit Before Income Taxes	5,641	9,795	17,171	12,621	11,095	12,627	14,290	11,917	8,232	10,117
Income Taxes	2,941	5,188	8,780	6,593	6,374	6,615	7,080	5,353	4,929	6,162
Net Profit After Taxes	2,700	4,607	8,391	6,028	4,721	6,012	7,210	6,564	3,303	3,955
* * * *	*	*	*	*	*	*	*	*	*	*
Net Worth (End of Year)	49,917	57,354	65,067	71,573	71,820	78,327	87,644	100,752	97,259	104,635
[No. Reporting Companies]	[6]	[7]	[9]	[12]	[17]	[19]	[19]	[19]	[19]	[20]

NOTE: Data collected and consolidated by the Certified Public Accounting firm of Brach, Gosswein & Lane, New York, N.Y.

SOURCE: Glover Study. House hearings, part 2. p. 872.

Table 6.

FINANCIAL REPORTING FORMS
MANUFACTURE AND SALES OF PHONOGRAPH RECORDS
COST OF GOODS SOLD REPORT
(thousands of dollars)

	1955	1956	1957	1958	1959	1960	1961	1962	1963	1964
A&R Costs	1,775	2,036	2,194	2,930	3,677	3,560	3,529	3,921	4,126	4,240
Studio Costs	1,586	1,827	2,140	3,000	3,597	3,922	3,962	4,277	4,676	5,044
Recording Session Costs	4,259	5,603	5,958	6,270	7,668	6,997	7,804	9,266	8,275	11,999
Artists Payments	5,539	7,531	9,296	11,666	14,615	15,266	18,359	20,770	19,885	21,201
AFTRA Payments	513	824	756	562	466	505	726	566	549	605
AF of M Payments	417	596	739	793	868	861	816	898	1,257	1,111
Actors Equity Association Payments	-	-	-	-	-	-	-	-	-	-
MPTF Payments	632	1,190	1,534	1,866	2,431	2,693	2,650	3,339	2,843	3,127
Purchased Masters	166	190	479	790	678	589	673	647	871	2,691
Art Department Costs	546	748	1,133	1,711	1,881	1,709	1,609	2,288	1,618	1,798
Manufacturing Costs	26,060	33,233	38,597	39,310	49,535	53,516	56,132	64,645	60,211	68,827
Shipping, Transportation, and Warehousing	2,697	3,270	3,734	4,650	5,326	5,169	5,003	6,558	6,952	8,388
Research and Development Engineering Costs	445	439	661	630	715	698	755	1,159	1,011	1,433
Purchased Records	2,339	3,602	4,892	7,711	12,355	13,692	13,667	14,576	15,169	11,923
Other	-	7	28	1,579	821	875	1,714	304	401	452
Copyright License Fees	5,997	9,452	11,287	13,001	16,256	17,380	18,839	22,632	22,228	25,234
TOTAL COST OF GOODS SOLD	52,971	70,548	83,428	96,469	120,889	127,432	136,238	155,846	150,072	168,073

NOTE: Data collected and consolidated by the Certified Public Accounting firm of Brach, Gosswein & Lane, New York, N.Y.

SOURCE: Glover Study. House hearings, part 2. p. 873.